UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE PORTIONS OF THE TRIAL TESTIMONY OF ANDY PETTITTE

Relying on Fed. R. Evid. 104(a), defendant moves to strike Andy Pettitte's testimony that, in 1999 or 2000, "Roger had mentioned to me that he had taken HGH and that it could help with recovery" (5/1/12 PM Tr. 27). Defendant claims (at 3-7) that this testimony must be stricken because the government has not met Rule 104(a)'s preponderance-of-the-evidence standard. Defendant is wrong. To secure the admission of defendant's 1999/2000 HGH statement pursuant to Rule 104(a), the government had to prove only two things by a preponderance of the evidence: (1) the statement was defendant's "own"; and (2) the statement was being offered "against" defendant. See Fed. R. Evid. 801(d)(2)(A); see generally Bourjaily v. United States, 483 U.S. 171, 176 (1987) ("court must be satisfied that the statement actually falls within the definition of the Rule"). And, those two facts are incontrovertible. Accordingly, this Court has properly admitted defendant's HGH statement as a non-hearsay admission by a party-opponent. This Court thus should deny defendant's motion to strike.

Although defendant nowhere cites Fed. R. Evid 104(b), his motion is really premised on that Rule, because, on cross-examination, Mr. Pettitte conceded the possibility that he had misunderstood the *substance* of defendant's admission. And, if defendant's admission did not relate to *defendant's* prior HGH use, but rather his *wife's* prior HGH use, this would raise a Rule

104(b) issue of relevancy conditioned on fact. Mr. Pettitte's testimony about defendant's admission has relevance only if the jury reasonably could find this condition of fact – defendant admitted his own HGH use (not Debbie's). But, Mr. Pettitte's direct-examination testimony *alone* establishes the requisite Rule 104(b) foundation, because, in "determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence." Huddleston v. United States, 485 U.S. 681, 690 (1988). Rather, this Court may only ask whether, considering "all the evidence in the case," a jury could "reasonably find" the conditional fact, *i.e.*, *defendant* had confessed to HGH use. Id. Of course a jury could, because a jury is always free to pick and choose amongst the constituent parts of a witness's testimony. Thus, for example, this jury must be permitted – if it desires – to fully credit Mr. Pettitte's direct-examination testimony and discount any cross-examination inconsistencies.

At any rate, by the end of Mr. Pettitte's redirect examination, Mr. Pettitte had confirmed for the jury that he had a present-day memory of the critical 1999/2000 conversation with defendant. More importantly, Mr. Pettitte also confirmed that his present-day memory of that conversation was as he had described it on direct examination, *viz.*, defendant admitted to Mr. Pettitte that he "used HGH" and "it helped with recovery" (5/1/12 PM Tr. 34; see 5/2/12 AM Tr. 52-53, 60-61; see also Exh. 45). This testimony thus dispelled any lingering ambiguity about Mr. Pettitte's understanding of the content of defendant's admission and more than satisfied Rule 104.

PROCEDURAL HISTORY

On direct examination of Mr. Pettitte, the government elicited testimony that, sometime during the 1999 or 2000 off-season, Mr. Pettitte was working out with defendant at the defendant's home when the two discussed HGH (5/1/12 PM Tr. 26-27). Specifically, as Mr. Pettitte thrice described it, Mr. Pettitte recalled that defendant admitted to him that defendant had taken HGH to assist with "recovery": "Roger had mentioned to me that he had taken HGH and that it could help with recovery" (id. 27); see also id. 34 ("Roger had told me that he had used HGH and that it helped with recovery"); id. 35 ("Roger told me that he had used HGH and that it helped with recovery"). Further, as part of Mr. Pettitte's direct examination, government counsel showed Mr. Pettitte Government's Exhibit 45, where government counsel had summarized Mr. Pettitte's description of the conversation (id. 34-35; see also Exh. 45 ("RC used HGH & it helped with recovery")). Mr. Pettitte affirmed that Exhibit 45 accurately summarized Mr. Pettitte's present-day memory of defendant's admission (5/1/12 PM Tr. 35).

On direct, Mr. Pettitte also described a later conversation he had with defendant, in 2005, at the Astros spring training facility in Florida. At that time, Mr. Pettitte approached defendant and asked him what defendant planned to say if anyone asked defendant if he had taken performance-enhancing drugs (5/1/12 PM Tr. 48-52). Defendant asked Mr. Pettitte what Pettitte was "talking about," and Mr. Pettitte, in turn, asked defendant if he had not earlier told Mr. Pettitte that he had "taken HGH" (id. 51). At that point, defendant denied that he had earlier confessed taking HGH, claiming that Mr. Pettitte had "misunderstood" him and asserting that he had only told Mr. Pettitte that defendant's wife (Debbie) had taken HGH (id.).

On cross-examination, defense counsel established that the 1999/2000 conversation likely

happened in the course of a strenuous workout and that Mr. Pettitte did not recall any other specifics of the 1999/2000 conversation (5/1/12 PM Tr. 108-09). Further, Mr. Pettitte agreed defendant's 1999/2000 confession of prior HGH use was a casual comment that did not reflect advice to Mr. Pettitte (id. 109-10). Moreover, on cross-examination, Mr. Pettitte agreed with defense counsel's leading suggestion that, "as you sit here today, if you had to think about it in your own mind, it's 50/50, [you] might have heard or you might have misunderstood" defendant confess to using HGH in 1999 or 2000 (5/2/12 AM Tr. 22-23).

Employing Government's Exhibit 45, government counsel returned to the topic of the 1999/2000 conversation during his redirect examination of Mr. Pettitte (5/2/12 AM Tr. 52-53; see also id. 52 (government counsel displays Exhibit 45 via ELMO before questioning Mr. Pettitte on 1999/2000 and 2005 conversations)).[1] During this redirect examination, Mr. Pettitte affirmed that he had a *present-day* memory of the 1999/2000 conversation and that his *present-day* memory of that 1999/2000 conversation was as he had "described it" on direct examination (id. 53; see also Exh. 45). These are reasonable inferences drawn from government counsel's use of Exhibit 45 during the redirect. As the transcript reflects, government counsel first published Exhibit 45 on the ELMO before counsel began questioning Mr. Pettitte about his various conversations with defendant (5/2/12 AM Tr. 52). Using Exhibit 45 as a reference point, government counsel reviewed the accuracy of Mr. Pettitte's direct-examination descriptions of his 1999/2000 and 2005 conversations with defendant (id. 53-55). Exhibit 45 recited Mr. Pettitte's direct-examination description of the 1999/2000 conversation as follows: "*RC used HGH* & it helped with recovery" (Exh. 45 (emphasis added)). Thus, when government counsel

[1] A copy of this Exhibit is attached for this Court's convenience.

asked Mr. Pettitte "as you sit here today" if he "remember[ed] that [1999/2000] conversation" (5/2/12 AM Tr. 53), Mr. Pettitte first confirmed that he had a present-day memory of that 1999/2000 conversation with defendant (id.). And, via the prosecutor's reference to Exhibit 45 then displayed on the ELMO, Mr. Pettitte also confirmed that his present-day memory of that conversation was accurately described in Exhibit 45, *i.e.*, sometime in 1999 or 2000, defendant admitted to Mr. Pettitte that defendant "used HGH" (id.).

Moreover, at the conclusion of his redirect, Mr. Pettitte expressly affirmed that everything recounted on Government's Exhibit 45 was "true and accurate to the best of your knowledge as you sit here today":

> Q: Mr. Pettitte, let me ask you – I'm almost done here. The chart that you have here, Government's Exhibit 45, is this true and accurate to the best of your knowledge as you sit here today?
>
> A. Yes, sir, to the best of my knowledge. (5/2/12 AM Tr. 60-61.)

Thus, by the conclusion of Mr. Pettitte's testimony, Mr. Pettitte had confirmed for the jury that (a) he presently remembered his 1999/2000 conversation with defendant in defendant's Texas home; and (b) Mr. Pettitte's present-day memory of this conversation was that defendant had confessed HGH use to Mr. Pettitte.

ANALYSIS

Defendant's 1999/2000 admission about his prior HGH use is an out-court statement being offered for its truth pursuant to Fed. R. Evid. 801(d)(2)(A), which deems a party's "own statement" not hearsay when admitted "against" that party. Defendant's admission is thus subject to the strictures of Fed. R. Evid. 104(a) and (b).

The government has easily satisfied Rule 104(a)'s preponderance standard, because Mr.

Pettitte's testimony definitively establishes that defendant – the party-opponent – made a statement about HGH sometime in either 1999 or 2000. Further, the government is offering this testimony "against" defendant.

As to Fed. R. Evid. 104(b), even at this stage of the trial, the government has established an adequate foundation establishing the relevancy of defendant's admission, because *the jury* could reasonably find the conditional fact – here, that defendant told Mr. Pettitte that *defendant* had previously used HGH – by a preponderance of the evidence. Indeed, the jury could make such a finding based solely on Mr. Pettitte's direct-examination testimony, because juries are permitted to reject all or part of a witness's testimony.

A. The government's evidence satisfied Fed. R. Evid. 104(a)

Rule 104(a) mandates that preliminary questions concerning "the admissibility of evidence shall be determined by the court." The proponent of such evidence has the burden of establishing such preliminary matters by preponderance of the evidence. Meister v. Medical Engineering Corp., 267 F.3d 1123, 1127 n.9 (D.C. Cir. 2009). Defendant argues (at 3-7) that Mr. Pettitte's equivocal cross-examination testimony means the government has not satisfied Fed. R. Evid. 104(a)'s preponderance standard. He is mistaken.

"Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary rules, which embody certain legal and policy determinations." Bourjaily, 483 U.S. at 175. Rule 104(a) thus operates to ensure that, "before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." Id.; see also Fed. R. Evid. 104(a) ("[p]reliminary questions concerning the . . . admissibility of evidence shall be determined

by the court").

In the context of an admission by a party-opponent, there are two technical requirements: "The statement is offered against a party and is . . . the party's own statement." Fed. R. Evid 801(d)(2)(A); see also Weinstein & Berger, Weinstein's Evidence Manual § 15.02[2], at 15-13 (2004 ed.) ("All that is required is that a statement made by a party is offered into evidence by an adverse party."). Here, these two facts are essentially undisputed. No one disagrees that defendant said *something* to Mr. Pettitte about HGH in the 1999/2000 time frame. Indeed, in unchallenged testimony, Mr. Pettitte described how – in 2005 – defendant himself later admitted that their 1999/2000 conversation was about HGH. However, defendant simultaneously claimed that their 1999/2000 conversation did not relate to defendant's HGH use, but rather related to Debbie Clemens's HGH use (5/1/12 PM Tr. 49).[2] Moreover, no one disagrees that the government is offering defendant's 1999/2000 statement *against* defendant. Thus, it is incontrovertible that the government has established the requisite preliminary facts for the admission of defendant's statement pursuant to Rules 104(a) and 801(d)(2)(A).

Accordingly, contrary to defendant's assertion, "the evidentiary Rule[] h[as] been satisfied" by proof well beyond preponderance of the evidence and this Court should deny defendant's motion to strike premised on Fed. R. Evid. 104(a). See Bourjaily, 483 U.S. at 175;

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[2] Although defendant suggests (at 3) that Mr. Pettitte was "[u]ncertain" about whether the 1999/2000 conversation "[h]appened," that is not accurate. Mr. Pettitte never betrayed uncertainty about whether he had a conversation with defendant about HGH sometime in 1999 or 2000. Rather, as described supra, at worst, Mr. Pettitte expressed uncertainty about his understanding of the substance of that conversation. Moreover, as we have also described supra, Mr. Pettitte has described a subsequent conversation – in 2005 – between himself and defendant, in which defendant admitted to Mr. Pettitte that their 1999/2000 conversation was about HGH, but claimed it was about Debbie's use of HGH.

see also United States v. Lang, 364 F.3d 1210, 1223 (1st Cir. 2004) ("Th[e government's] evidence indicated by a preponderance of the evidence that Mr. Lang spoke to Mr. Ure. Mr Ure's testimony was, therefore, admissible as a non-hearsay admission by party-opponent."), vacated on other grds, 543 U.S. 1108 (2005); Weinstein & Berger, supra, § 801.30[4], at 801-55 ("[a] statement qualifies as a party admission even though the party denies having made it, if the statement's proponent provides adequate proof to support a finding that the statement was made by the party"); Mueller & Kirkpatrick, Evidence Practice Under the Rules § 8.27, at 882 (2009 ed.) ("A party who denies making a statement cannot keep it out by objecting on this ground if the proponent presents sufficient proof to support a jury finding that the objecting party made the statement.").[3]

B. The government's evidence satisfied Fed. R. Evid. 104(b)

Rule 104(b) states that, when "the relevancy of evidence depends upon the fulfillment of

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[3] Because the government's evidence unequivocally establishes that *defendant* – the party-opponent – made a statement about HGH to Mr. Pettitte sometime in 1999 or 2000, defendant's lone Fed. R. Evid. 801(d)(2)(A) authority (at 4-5) is inapt. In Hamel v. General Motors Corp., 1990 WL 7490 (D. Kan. 1990), the accident-report's author (an ambulance attendant) "flatly denied that the plaintiff made any statement that the accident occurred as a result of a blowout or the loose gravel on the road." Id. at *6. Indeed, the ambulance attendant "testified that the statement was merely an assumption on her part." Id. Accordingly, the Hamel court ruled that the statement was not properly admitted as the statement of a party-opponent because "the court was unable to find that there was a sufficient basis for concluding that the statement was made by the plaintiff." Id. at *7. Defendant also cites (at 4) Boca Investerings Partnership v. United States, 128 F. Supp. 16 (D.D.C. 2000), but that authority addresses Fed. R. Evid. 803(6), the business-records exception to the hearsay rule. Moreover, it too is factually distinguishable. In Boca, the court declined to admit a document pursuant to Rule 803(6) because the proponent had failed to establish that the proffered business record "was written by a 'person with knowledge,'" a prerequisite to admission pursuant to Rule 803(6). Id. at 19-20. However, as we have explained, the uncontroverted evidence establishes that defendant – the party-opponent – discussed HGH with Mr. Pettitte in 1999/2000, the prerequisite to admission pursuant to Rule 801(d)(2)(A).

a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of fulfillment of the condition." Although defendant nowhere mentions Fed. R. Evid 104(b), his current motion could be interpreted as invoking it.

"In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." Huddleston, 485 U.S. at 690; see also Advisory Comm. Notes to Fed. R. Evid. 104(b) ("The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.").

Here, via Mr. Pettitte's testimony, the government has sought to admit defendant's 1999/2000 statement that he took HGH for recovery purposes. The relevancy of this fact naturally depends on the government establishing that *defendant* admitted taking HGH, as opposed to, for example, his wife Debbie. Contrary to defendant's suggestion, Mr. Pettitte's direct-examination testimony alone established the requisite Rule 104(b) foundation for admission of this statement (*i.e.*, that *defendant* admitted taking HGH in 1999/2000). Pursuant to Fed. R. Evid. 104(b), when making a preliminary determination about whether the government has adduced sufficient evidence to meet Rule 104(b), this Court is not permitted to weigh

credibility. And, a jury is always "free to accept the testimony of one or more witnesses in part only." United States v. One Star, 979 F.2d 1319, 132 (8th Cir. 1992) (citing United States v. Sinclair, 444 F.2d 888, 889-90 (D.C. Cir. 1971)); see also Payne v. United States, 516 A.2d 484, 493 (D.C. 1986) ("Robinson's recantation on cross-examination did not make his testimony, directly implicating appellants' in the robbery, incredible as a matter of law. Rather, as the trial court correctly noted . . . conflicts created by a witness' recantation, like other internal inconsistencies within a witness' testimony, are factual questions for the jury to resolve.").

Thus, even assuming Mr. Pettitte equivocated on cross-examination about his understanding of the substance of defendant's confession, this would not preclude its submission to the jury because of the substance of Mr. Pettitte's *direct*-examination testimony which, for Rule 104(b) purposes, this Court must assume is true. Further, Mr. Pettitte's direct-examination description of defendant's 1999/2000 confession is corroborated by his direct-examination testimony that, after hearing defendant's HGH confession, Mr. Pettitte went to Mr. McNamee and "asked him what" HGH was (5/1/12 PM Tr. 28; see also 5/2/12 AM Tr. 54). Moreover, Mr. Pettitte's direct-examination description of defendant's 1999/2000 HGH confession is further corroborated by Mr. Pettitte's redirect testimony that he "didn't think" defendant had mentioned Debbie Clemens when Pettitte and defendant talked in 1999/2000 (5/2/12 AM Tr. 56). Cf. United States v. Gil, 58 F.3d 1414, 1419 (9th Cir. 1995) ("testimony of handwriting expert that Montoya was 'probably' the author of the Abuelitos ledger, combined with circumstantial evidence that Montoya wrote the ledger entries, provides an adequate foundation for admitting the ledger as an admission by Montoya"); cf. Fed. R. Evid. 602.

Finally, exclusion here of Mr. Pettitte's description of defendant's 1999/2000 HGH

confession would be particularly inappropriate given that a reasonable fact finder could place greater weight on Pettitte's initial understanding of the conversation than on more recent, arguably equivocal testimony that could reasonably be viewed as subject to external influences. Mr. Pettitte's testimony about defendant's HGH confession relates back to the 1999 or 2000 time period. This was a moment in time before steroids/HGH had become the subject of, for example, the Mitchell Report. Obviously, it was also a moment in time before players' use of steroids/HGH had become the subject of press reports. In light of these subsequent developments, a reasonable fact finder naturally would be entitled to ascribe greater weight to a description – Mr. Pettitte's – of defendant's HGH confession that predated all those bias-inducing events.[4]

C. At any rate, the government established by a preponderance of the evidence that defendant made the statement that he had used HGH for recovery

At any rate, even if this Court disagrees with the government's Rule 104 analysis, by the conclusion of Mr. Pettitte's testimony, the government had established by a preponderance of evidence that defendant had confessed his HGH use to Mr. Pettitte.

Three times on direct examination, Mr. Pettitte described how, in 1999 or 2000, defendant had admitted to Mr. Pettitte that defendant had used HGH for recovery purposes. On redirect examination, Mr. Pettitte first re-affirmed his memory of defendant's admission when –

[4] But, as Huddleston teaches, it is premature for this Court even to assess whether the jury reasonably could find this conditional fact by a preponderance of the evidence. Such a preliminary assessment about the sufficiency of the government's foundational showing depends on "all evidence presented to the jury." 485 U.S. at 690-91; see also id. at 690 n.7 ("'It is, of course, not the responsibility of the judge sua sponte to insure that the foundation evidence is offered; the objector must move to strike the evidence if *at the close of the trial* the offeror has failed to satisfy the condition." (citation omitted; emphasis added)).

via the prosecutor's reference to Government's Exhibit 45 – he confirmed that he then remembered the conversation as he had described it in his direct examination (5/2/12 AM Tr. 53, 60-61). Even more critically, at the very end of Mr. Pettitte's redirect, he agreed that Government's Exhibit 45 was "true and accurate" as he sat there that "[]day" (id. 60-61). This testimony established by much more than a preponderance of the evidence that defendant "made the proffered statement." Weinstein & Berger, supra, § 15.02[2], at 15-13.

Defendant is thus wrong when he claims (at 5) that on "re-direct, the Government never directly confronted Mr. Pettitte's 50/50 memory as Mr. Pettitte 'sit[s] here today.'" That is precisely what government counsel did when – deploying Government's Exhibit 45 on the ELMO – counsel had Mr. Pettitte affirm that his in-court memory of the 1999/2000 conversation was as Mr. Pettitte had described it on his direct examination (as reflected on Government's Exhibit 45). Defendant ignores government counsel's use of Exhibit 45 when he claims (at 6) that counsel's "[a]s you described it" question was "ambiguous." It was not ambiguous because the question referred to the substantive description of the 1999/2000 conversation reflected on Exhibit 45 (and then displayed on the ELMO). Moreover, at the conclusion of Mr. Pettitte's redirect, government counsel expressly asked Mr. Pettitte if Government's Exhibit 45 was "true and accurate"; Mr. Pettitte affirmed that it was (5/2/12 AM Tr. 60-61).

Defendant makes no mention of Government's Exhibit 45 in his motion. But, as we have explained, Exhibit 45 provides the necessary context for Mr. Pettitte's affirmation that his present-day memory of his 1999/2000 conversation with defendant was as he "described it" in his direct examination.

D. Mr. Pettitte's testimony is highly probative and not unfairly prejudicial

Finally, defendant contends (at 7-8) that Rules 401 and 403 provide independent grounds for striking Mr. Pettitte's testimony. Specifically, he argues (at 7) that "Mr. Pettitte's equivocal testimony" about defendant's HGH admission does not satisfy Fed. R. Evid. 401, because Mr. Pettitte is "only 50 percent sure it happened *at all*." Moreover, he asserts (at 8) that it would be "terribly unfair" for the jury to consider this testimony, because of the "limitations Mr. Pettitte put on his own memory" and, indeed, the jury "might very well take more from Mr. Pettitte's testimony than it actually deserves because Mr. Pettitte appeared credible and was [defendant's] teammate and close friend." This Court should reject these arguments.

First, defendant's Rule 401 argument betrays a fundamental misunderstanding of that Rule's operation. "Under Rule 401, evidence is relevant if it has the slightest bit of probative worth; only evidence that has no value as proof of a consequential fact is irrelevant." Wright & Miller, Federal Practice and Procedure § 5165 (2012 Supp.); see also United States v. Foster, 986 F.2d 541, 545 (D.C. Cir. 1993) ("Evaluating all the evidence on a particular issue is for the jury. Each piece of evidence need not be conclusive: 'A brick is not a wall.'" (citation omitted)). As we have shown, Mr. Pettitte's testimony about defendant's HGH admission was not equivocal. On redirect, Mr. Pettitte re-affirmed his in-court memory of the 1999/2000 conversation: defendant admitted to Mr. Pettitte that he had taken HGH for recovery purposes. However, even if Mr. Pettitte had not done so, his testimony still has significant value as proof of the central issue in this case, *viz.*, did defendant lie to Congress when he claimed he had never taken HGH. At worst, Mr. Pettitte has only indicated that he *may* have misunderstood defendant's HGH admission. Based on all the government's evidence – including, *inter alia*, the physical evidence

linking defendant to steroids – it will be the fact finder's task to ultimately assess the significance of that aspect of Mr. Pettitte's testimony. This Court thus must decline defendant's invitation to strike Mr. Pettitte's testimony on relevancy grounds. "The judge cannot make decisions as to the weight of the evidence under the guise of determining relevance." Wright & Miller, supra, § 5165.

Second, Rule 403 does not serve as independent bar to the admission of Mr. Pettitte's testimony about defendant's HGH confession. "[T]he rationale for the hearsay exception to party-opponent statements lays in a 'kind of estoppel or waiver theory, that a party should be entitled to rely on the opponent's statements,' such that the damage that follows from one's own statements is not 'unfair prejudice' for the purposes of a Rule 403 analysis." Bonds v. Dautovic, 725 F Supp. 2d 841, 847 (S.D. Iowa 2010) (citation omitted). If the jury ultimately credits Mr. Pettitte's testimony about defendant's admission to HGH use, the government has no doubt this will appropriately undermine defendant's claim of innocence. But, contrary to defendant's suggestion (at 8), it is not the province of this Court to decide how much weight Mr. Pettitte's testimony about defendant's HGH confession "actually deserves." That assessment is reserved for the jury.

* * * * *

Seizing on a single answer ("I'd say that's fair") to a leading cross-examination question ("50/50, might have heard or you might have misunderstood him"), defendant asks this Court to strike Mr. Pettitte's highly probative direct-examination testimony about defendant's 1999/2000 confession to prior HGH use (5/2/12 AM Tr. 23). There is no basis for such a ruling. In full compliance with Rule 104(a), the government's evidence established by at least a preponderance

of evidence the requisite criteria for admission of the statement pursuant to Fed. R. Evid. 801(d)(2)(A). Moreover, because, *inter alia*, Mr. Pettitte affirmatively declared on direct examination that he recalled *defendant* confessing to the use of HGH, the government's evidence established the requisite Rule 104(b) foundation for admission of that highly relevant statement. Thus, this Court should decline defendant's invitation to deprive the fact finder of this obviously probative evidence.

CONCLUSION

This Court should deny defendant's motion to strike portions of Mr. Pettitte's testimony.

Respectfully Submitted,

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ATTACHMENT

DATE	LOCATION	EVENT
1999/ 2000 offseason	Clemens house Texas	RC used HGH & it helped with recovery
2002	Tampa, Florida	AP uses HGH
2004	Texas	AP use HGH second time
March 2005	Kitchen - facility Kissimmee, Florid	2nd conversation re Debbie Clemens (1st mention)
September 2006	Atlanta, Georgia	discussion about LA Times article