UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
AUG 26 2013
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

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| IN RE PETITION OF BRIAN MCNAMEE | ) | Misc. Action No. 12-532 |
| | ) | UNDER SEAL |

# MEMORANDUM OPINION

Brian McNamee has petitioned for disclosure of certain grand jury testimony, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i), to be used in an ongoing civil lawsuit before the United States District Court for the Eastern District of New York. ECF No. 1. The Court will grant this request regarding the requested grand jury testimony from this district, and will deny it regarding testimony from another district.

## I. BACKGROUND

### A. Factual Background

> Roger Clemens is a former Major League Baseball . . . Player who at various times was a member of the Boston Red Sox, Toronto Blue Jays, New York Yankees, and Houston Astros. [Petitioner] Brian McNamee worked as an athletic trainer for the Toronto Blue Jays and New York Yankees, as well as personal trainer for Roger Clemens. McNamee's relationship with Clemens began in 1998 in Toronto and continued during and after Clemens' time with the New York Yankees. In the spring of 2007, McNamee was approached by federal investigators regarding the delivery of illegal performance-enhancing drugs to athletes. Under penalty of perjury, McNamee informed the investigators that he had injected Roger Clemens with steroids and human growth hormone ("HGH") on multiple occasions. Following his cooperation with the U.S. Attorney's Office, in order to avoid prosecution, McNamee met with former Senator George Mitchell and assisted his investigation into steroid and HGH use in Major League Baseball.
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> On December 13, 2007, Senator Mitchell released his report entitled "Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball," commonly referred to as the "Mitchell Report." The

> Mitchell Report was published in response to the suspected widespread use of performance enhancing drugs in professional baseball. Roger Clemens was among the 89 players named in the Mitchell Report who were alleged to have used performance enhancing substances. In addition to his testimony that he personally injected Clemens with HGH and steroids, McNamee provided federal investigators with used syringes, cotton balls, gauze, and broken steroid ampules.
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> The Mitchell Report was released to the public and included McNamee's statements regarding his interaction with Roger Clemens. McNamee is the only person who publicly stated that he witnessed and assisted Roger Clemens in using steroids and HGH. McNamee alleged that he personally injected Clemens on multiple occasions. Following the release of the Mitchell Report, Clemens publicly denied all allegations of drug use. Clemens, personally and through his agents and attorneys, directly and specifically refuted all of McNamee's claims.

*McNamee v. Clemens*, 09-cv-1647, 2013 WL 3968740 (E.D.N.Y. July 31, 2013) (internal citations omitted).

**B. The Criminal Case**

In 2009 and 2010, a grand jury convened in this court and considered whether to indict Mr. Clemens on charges that he lied to Congress when he testified that he had never taken anabolic steroids or HGH. The grand jury in this district heard testimony from, *inter alia*, Mr. McNamee (Mr. Clemens' former athletic trainer), Anthony Corso (one of Mr. McNamee's former training clients), Andy Pettitte (a professional baseball player), David Segui (a former professional baseball player), and Kirk Radomski (a seller of anabolic steroids and human growth hormone). Earlier, in 2007, Mr. Radomski had also testified before a grand jury in the Northern District of California. The D.C. grand jury indicted Mr. Clemens. *See* Indictment, *United States v. Clemens*, 10-cr-223, ECF No. 1 (D.D.C. Aug. 19, 2010).

In 2012, Mr. Clemens was tried and acquitted. *See* Judgment, *United States v. Clemens*, 10-cr-223, ECF No. 205 (D.D.C. June 25, 2012). During the trial, the jury heard testimony from, *inter alia*, the five aforementioned witnesses.

**C. Prior Acknowledgment of Certain Grand Jury Testimony**

At trial, Mr. Clemens' attorney relied on Mr. Corso's and Mr. Radomski's grand jury testimony during cross-examination of those two witnesses. *See, e.g.*, Transcript of Trial Proceedings, *United States v. Clemens*, 10-cr-223 (D.D.C. May 29, 2012), Pet'r's Ex. S, at 64:15-21, 42:6-8, 50:10-25, 54:10-13, 54:21-25, 56:22-24 (Corso); Transcript of Trial Proceedings, *United States v. Clemens*, 10-cr-223 (D.D.C. May 9, 2012), Pet'r's Ex. L, at 8:21-12:22, 41:8-14, 43:13-15 (Radomski). On re-direct, the government also referred to both witness' grand jury testimony. Ex. S at 129:12-134:21 (Corso); Ex. L at 81:1-4 (Radomski)

That Mr. Segui testified before the grand jury has been reported in the press. *See* Pet'r's Mem. 14 n.11 (collecting contemporaneous new reports of Mr. Segui's appearance before the grand jury in June 2010). At trial, Mr. Clemens' counsel referred to Mr. Segui's grand jury testimony during a bench conference. Transcript of Trial Proceedings, *United States v. Clemens*, 10-cr-223, (D.D.C. May 24, 2012), Pet'r's Ex. R, at 79:2-80:1.

Mr. McNamee states that he has a "good-faith basis" to believe that Mr. Pettitte testified before the grand jury, but "has been unable to confirm" this. Pet'r's Mem. 12 n.8.

Mr. McNamee acknowledges that he testified before the grand jury. Pet'r's Mem. 1.

**D. The Civil Case**

In 2008, Mr. McNamee filed a civil action against Mr. Clemens, now pending in the Eastern District of New York. Complaint, *McNamee v. Clemens*, 09-cv-1647, ECF No. 11 (E.D.N.Y., Jul. 31, 2009). The sole remaining claim in this action is a defamation claim based on statements that Mr. McNamee was a liar and that he manufactured false evidence against Mr. Clemens. *See McNamee v. Clemens*, 762 F. Supp. 2d 584 (E.D.N.Y. 2011) (dismissing the intentional infliction of emotional distress claim and narrowing the defamation claim); *see also*

*McNamee,* 09-cv-1647, 2013 WL 3968740 (denying defendant's motion to clarify the 2011 opinion regarding the scope of the statements within the scope of the defamation claim).

Discovery in the civil case began in late 2012 after the criminal case had concluded. Between the two parties' Rule 26 initial disclosures, all five of the witnesses whose grand jury testimony is at issue here have been named as likely to have discoverable information. Mr. Clemens listed Mr. McNamee, Mr. Corso, and Mr. Pettitte, *see* Def.'s Initial Disclosures. Pet'r's Ex. F. Notably, for both Mr. Corso and Mr. Pettitte, Mr. Clemens' disclosure form suggests that the subject matter of their discoverable information is related to their testimony at the criminal trial. *Id.* Mr. McNamee listed Mr. Segui and Mr. Radomski. *See* Letter from Debra Greenberger to Rusty Hardin et al., Pet'r's Ex. E.

Mr. McNamee filed this petition pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i) seeking disclosure of the grand jury testimony of five witnesses, including himself. Pet., Oct. 9, 2012, ECF No. 1. Mr. Clemens' attorneys have not filed anything in response. *See* Affidavit of Service, ECF No. 3 (attesting that the petition was served on Mr. Clemens' attorneys via Federal Express). The United States "takes no position" on the petition. Notice Regarding Resp. of United States, Jan. 22, 2013, ECF No. 6. Each of the four other witnesses whose grand jury testimony Mr. McNamee seeks here have been served with the petition. Affidavit of Service, Apr. 10, 2013, ECF No. 8. None have filed anything in response.

## II. LEGAL STANDARD

"There is a tradition in the United States—one that is 'older than our Nation itself'—that proceedings before a grand jury should remain secret." *In re Petition of Kutler*, 800 F. Supp. 2d 42, 44 (D.D.C. 2011) (quoting *In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973) (quoting *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959))). This tradition is

codified in Federal Rule of Criminal Procedure 6(e). Grand jury secrecy is justified by a number of objectives, including:

> (1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; [and] (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

*Kutler*, 800 F. Supp. 2d at 44 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681–82 n. 6 (1958)).

But this secrecy is not without exceptions. These exceptions, which "have developed historically alongside the secrecy tradition," are codified in Rule 6(e)(3). *Kutler*, 800 F. Supp. 2d at 44 (quoting *In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997)). Rule 6(e)(3)(E)(i) provides that the courts "may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter . . . preliminarily to or in connection with a judicial proceeding." In order to obtain disclosure of grand jury testimony, a party must establish a "particularized need" for that testimony, which requires showing that (1) the "material [sought] is needed to avoid a possible injustice in another judicial proceeding"; (2) "the need for disclosure is greater than the need for continued secrecy"; and (3) "the[ ] request is structured to cover only material so needed." *In re Sealed Case*, 250 F.3d 764, 771 (D.C. Cir. 2001) (quoting *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979)).

However, grand jury witnesses *themselves* have "a general right to a transcript of [their own grand jury] testimony absent the government demonstrating countervailing interests which

outweigh the right to release of a transcript." *In re Sealed Motion*, 880 F.2d 1367, 1373 (D.C. Cir. 1989). The "particularized need" test does not apply to such requests. *Id.*; *see also In re Grand Jury*, 490 F.3d 978, 990 (D.C. Cir. 2007) (holding that grand jury witnesses "are entitled under Rule 6(e)(3)(E)(i) to review transcripts of their own grand jury testimony in private at the U.S. Attorney's Office or a place agreed to by the parties or designated by the district court" but leaving "for another day" the question of whether the witness could obtain a copy of his prior testimony).

The rule also establishes procedures for petitions for seeking disclosure of testimony. Rule 6(e)(3)(F) requires that any "petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened," and requires that "the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) an attorney for the government; (ii) the parties to the judicial proceeding; and (iii) any other person whom the court may designate." Rule 6(e)(3)(G) provides that "if the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper."

## III. ANALYSIS

Mr. McNamee is entitled to a disclosure of his own grand jury testimony and the grand jury testimony presented in this district by the other four witnesses. His petition plainly arises "in connection with a judicial proceeding" as required under Rule 6(e)(3)(E)(i)—namely, the civil action in the Eastern District of New York—and he has demonstrated a "particularized need" for this testimony under the three-part test of *Douglas Oil*.

### A. Mr. McNamee is Entitled To Disclosure of His Own Grand Jury Testimony

Mr. McNamee seeks a transcript of his own grand jury testimony. Because the government has not demonstrated any "countervailing interests which outweigh the right to release of [such] a transcript," Mr. McNamee has a "general right" to such a transcript and need not meet the three-part "particularized need" test established by the Supreme Court in *Douglas Oil*. *In re Sealed Motion*, 880 F.2d at 1373. Mr. McNamee is entitled under Rule 6(e)(3)(E)(i) to at least "review transcripts of [his] own grand jury testimony in private at the U.S. Attorney's Office or a place agreed to by the parties or designated by the district court." *In re Grand Jury*, 490 F.3d at 990. The circuit has not addressed whether a witness would be further entitled to a transcript of his own testimony. *Id.* The Court finds that Mr. McNamee is entitled to a transcript because he has demonstrated a particularized need (discussed below) for the grand jury transcripts in the pending civil matter, because neither the government nor the opposing party have raised any objections to such disclosure, and because the Court finds there is no significant interest in keeping from Mr. McNamee the transcript of his own testimony.

### B. Mr. McNamee is Entitled To Disclosure of The Grand Jury Testimony of the Other Four Witnesses Given In This District

Because he satisfies the three-part *Douglas Oil* test, Mr. McNamee is also entitled to disclosure of the grand jury testimony of the other four witnesses insofar as the testimony was given in this district.

#### 1. Disclosure is Necessary to Avoid a Possible Injustice in Another Judicial Proceeding

To warrant disclosure, the material must be "needed to avoid a possible injustice in another judicial proceeding." *Douglas Oil Co.*, 441 U.S. at 222. Mr. McNamee's petition satisfies this element.

Asymmetrical access to previous grand jury testimony of witnesses by the parties in a civil trial creates a "possible injustice." *See, e.g.*, *In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d 1293, 1302-03 (4th Cir. 1986) (recognizing that the particularized need for disclosure becomes "strong" in such a case where disclosure is "in order not merely to assure the accuracy of the testimony but also to equalize the access to relevant facts which each side possesses and to eliminate the obvious unfair advantage, arising from affording only one side exclusive access to a storehouse of relevant fact" (internal quotations omitted)).

Because all four of the witnesses whose grand jury testimony is at issue here testified at the criminal trial as witnesses for the government, Mr. Clemens would have been legally entitled to "any statement of the witness that [was]s in the[ government's] possession and that relates to the subject matter of the witness's testimony," including any grand jury testimony they gave on matters related to their trial testimony. Fed. R. Crim. P. 26.2(a) & (f)(3). Mr. Clemens' attorney relied substantially on the grand jury testimony of Mr. Corso and Mr. Radomski in the cross-examination of these two government witnesses. *See, e.g.*, Pet'r's Ex. S, at 64:15-21, 42:6-8, 50:10-25, 54:10-13, 54:21-25, 56:22-24 (Corso); Pet'r's Ex. L, at 8:21-12:22, 41:8-14, 43:13-15 (Radomski). His attorney also referred in passing to the grand jury testimony of Mr. Segui in an on-the-record bench conference. Pet'r's Ex. R, at 79:2-80:1.

Each of these four witnesses have been listed, by one side or the other, as potential sources of discoverable material in the civil trial. Mr. Clemens already possesses all of these witnesses' prior grand jury testimony and Mr. McNamee has none of them. This is an unfair advantage for Mr. Clemens, and creates a possible injustice, qualifying for disclosure under the first prong of the *Douglas Oil* test.

**2. The Need for Disclosure is Greater than the Need for Continued Secrecy**

The second *Douglas Oil* element is that "the need for disclosure [must be] greater than the need for continued secrecy." *Douglas Oil Co.*, 441 U.S. at 222. Mr. McNamee's request satisfies this element.

**i. The Need For Disclosure**

Roughly speaking, the civil case appears to hinge, in part, on whether Mr. McNamee's testimony that he personally injected Clemens with HGH and steroids was true or false, and on whether the physical evidence of Mr. Clemens' drug use Mr. McNamee provided to the federal investigators was or was not fabricated. All four of the witnesses testified during the criminal trial on one of these two questions.

Mr. McNamee identifies particular points of the criminal testimony by each of the four witnesses where access to the grand jury testimony might allow him to bolster his preferred version of these events by either impeaching the witness or refreshing their recollection. Pet. 11-15. Notably, the grand jury testimony was given in 2009 or 2010 about events that occurred between 1998 and 2003—that is, more than ten years ago. Access to grand jury testimony would appear to be a useful way to prepare for questioning these witnesses.

As to Mr. Pettitte, Mr. McNamee points to an apparent inconsistency between his trial testimony on direct examination and on cross-examination regarding a conversation he allegedly had with Mr. Clemens about his use of performance enhancing drugs. Pet. 11-12. He suggests that Mr. Pettitte's grand jury testimony might be useful to bolster the credibility of his preferred interpretation of this testimony by refreshing Mr. Pettitte's recollection of his initial account of the conversation. *Id.*

As to Mr. Corso, Mr. McNamee points out that, during cross-examination at the criminal trial Mr. Clemens' attorney asked Mr. Corso multiple questions about his grand jury testimony, including questions about his testimony that Mr. Clemens used HGH. Pet. 13. Mr. Clemens' attorney apparently attempted to impeach Mr. Corso using his prior grand jury testimony. *Id.* Mr. McNamee suggests that Mr. Clemens' attorney would likely use the same approach at the civil trial, and that he needs the grand jury testimony to prepare. *Id.*

As to Mr. Segui, Mr. McNamee explains that his testimony would be used to corroborate the validity of the physical evidence Mr. McNamee provided to the federal investigators of Mr. Clemens' drug use, and that his grand jury testimony would be useful to refresh his recollection or to impeach his testimony on the subject. Pet. 14.

Finally, as to Mr. Radomski, Mr. McNamee points out that Mr. Clemens' counsel cross-examined this witness extensively at trial with questions about his grand jury testimony, using it both to refresh his recollection and to impeach his testimony. Pet. 15. Mr. McNamee suggests that Mr. Clemens' attorney in the civil trial would be likely to adopt the same approach with this witness, and that he needs access to the grand jury testimony to prepare.

**ii. The Need for Continued Secrecy**

As discussed above, the Supreme Court has identified five objectives for grand jury secrecy. *Procter & Gamble Co.*. 356 U.S. at 681–82 n. 6.

None of the first three objectives apply in this case because each is intended to protect interests of pending grand juries. The first objective—"[t]o prevent the escape of those whose indictment may be contemplated"—does not apply in this case, as the indictment has already been issued, and the trial has already been conducted, so there is no risk of Mr. Clemens escaping. Similarly, the second objective—"to insure the utmost freedom to the grand jury in its

deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors"—does not apply because there is no risk in the present case of Mr. Clemens "importuning the grand jurors" as the grand jury has already completed its work. And, there is no interest in "insur[ing] the utmost freedom to the grand jury in its deliberations" because the grand jury is no longer deliberating in this case. And, the third objective—"to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it"—does not apply in this case, as the grand jury is no longer active in this case so that there is no danger of tampering with the witnesses who may appear before it.

The fourth objective—"to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes"—does apply here. The requested disclosures pose the risk of making public, for the first time, certain statements made in the security of the grand jury. For instance, it is possible that one or more of the witnesses at issue here made statements to the grand jury about illegal conduct by individuals other than Mr. Clemens. If such statements were to be made public now, outside the scope of any criminal prosecution of such a named individual, the witness who revealed that information may face some unwanted scrutiny. This, in turn, would risk deterring future witnesses from speaking openly in the grand jury.

The fifth objective—"to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt"—bears indirectly on the issue here. As was just discussed, the requested disclosures pose the risk of making public, for the first time, accusations against individuals other than Mr. Clemens—individuals who the government has no intention of

prosecuting now. Such disclosures would harm an "innocent accused," although they may never have been under formal investigation.

**iii. Analysis**

In light of the concerns raised under the fourth and fifth secrecy objectives, the Court has reviewed the requested transcripts in camera. After conducting this review, the Court determined that there is no risk of either type of injury. Any allegation or accusation made by these four witnesses before the grand jury has been made public—either during their testimony at trial, in the Mitchell Report, in some other legal proceeding, or in the media. Thus, there is no risk of further injury posed by disclosure either to the confidence of future grand jury witnesses or to those who stand accused. Accordingly, the need for disclosure outweighs the need for secrecy, and the petitioner satisfies this element of the *Douglas Oil* test.

**3. The Request is Structured to Cover Only Material So Needed**

The third *Douglas Oil* element is that "the[ ] request [must be] structured to cover only material so needed." *Douglas Oil Co.*, 441 U.S. at 222. Mr. McNamee has requested testimony of only five witnesses of many others who testified at trial and possibly before the grand jury. And he has provided detailed descriptions of how he expects to use this testimony, reviewed above. The Court is satisfied that this request has been sufficiently narrowly tailored to warrant disclosure. This element is satisfied.

Since all three elements are satisfied, petitioner is entitled to disclosure pursuant to *Douglas Oil* and Rule 6(e)(3)(E)(i).

**C. This Court Cannot Order Disclosure of Grand Jury Testimony From Other Districts**

Mr. Radomski gave grand jury testimony both in D.C. and in the Northern District of California. This Court cannot order the disclosure of the Northern District of California grand

jury transcripts because Rule 6(e)(3)(F) requires that any "petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened."

## IV. CONCLUSION

The petition for disclosure of grand jury testimony is granted with respect to the D.C. grand jury testimony of Brian McNamee, Andy Pettitte, Anthony Corso, David Segui, and Kirk Radomski. It is denied with respect to the Northern District of California testimony of Kirk Radomski. An order shall be issued with this opinion.

Signed by Royce C. Lamberth, U.S. District Judge, August 26, 2013.