

1 MELINDA HAAG (CABN 132612)
United States Attorney

2 J. DOUGLAS WILSON (DCBN 412811)
3 Deputy Chief, Criminal Division

4 MATTHEW A. PARRELLA (NYBN 2040855)
JEFFREY D. NEDROW (CABN 161299)
5 MERRY JEAN CHAN (CABN 229254)
Assistant United States Attorneys

6 150 Almaden Boulevard, Suite 900
7 San Jose, CA 95113
Telephone: (408) 535-5045
8 Facsimile: (408) 535-5066
Email: jeff.nedrow@usdoj.gov

9 Attorneys for Plaintiff

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 v.)
16 BARRY BONDS,)
17 Defendant.)
18)
19)
20)

No. CR 07-0732-SI

**UNITED STATES’S OPPOSITION TO
DEFENDANT’S MOTION *IN LIMINE*
TWO TO PROHIBIT LAY WITNESS
TESTIMONY DESCRIBING SIDE
EFFECTS OF ANABOLIC STEROID
USE, AND TO RESTRICT EXPERT
TESTIMONY (DOCKET #222)**

Date: March 1, 2011
Time: 2:00 p.m.
Judge: Honorable Susan Illston

21 **INTRODUCTION**

22 The defendant has renewed his motion to exclude observations by percipient witnesses of
23 the defendant’s development of physical characteristics consistent with the use of anabolic
24 steroids. He also seeks to limit the expert testimony of Dr. Larry Bowers to steroid side effects
25 that have been expressly referenced in his prior declarations, testimony, or expert disclosures.
26 The defense motion is without factual or legal merit and should be denied.
27
28

FACTS

1
2 In compliance with Fed. R. Crim. P. 16(a)(1)(G), the United States has notified the
3 defense that it intends to call Dr. Larry Bowers, the medical director for the United States Anti-
4 Doping Agency, as an expert witness under Fed. R. Evid. 702.

5 In a letter dated January 20, 2009, the United States notified the defense that Dr.
6 Bowers's expected testimony would encompass "the side effects of steroid use, including effects
7 on blood values, possible organ damage, and other side effects." Docket #224 at 4.¹

8 In a declaration dated January 26, 2009, Dr. Bowers stated that he was "familiar with the
9 physiological results of taking anabolic steroids and other performance-enhancing drugs in terms
10 of their impact on a person's physique, blood, and urine." Docket #100 at ¶ 4. The declaration
11 noted that testosterone can cause muscle growth and retention and benefit a person's ability to
12 recover from muscle fatigue. *Id.* at ¶ 6b. Human growth hormone ("HGH") could be responsible
13 for the growth of a large number of bodily systems, including muscles and bones. *Id.* at ¶ 6c.

14 In a declaration dated February 13, 2009, Dr. Bowers stated that "all anabolic steroids,"
15 including testosterone, "can cause a variety of physiological effects in a person, including:"

- 16 - increased hair growth on the trunk and extremities (primarily in women)
- 17 - male pattern baldness
- 18 - the development of acne, particularly on the upper back
- 19 - decrease in testicular size
- 20 - increased aggressiveness, feelings of invincibility, "roid rage"
- 21 - weakening of the heart
- 22 - hypertension
- 23 - injury to the liver
- 24 - possible links to prostate cancer

25 Docket #128-1 at ¶¶ 3, 4d, 4g. In addition, Dr. Bowers stated that HGH can cause "an increase in
26 the size of one's head or skull, jaw, hands and fingers, and feet and toes, as well as improved
27

28 ¹ Excerpts from Docket ##224, 100, 128-1, and 137 are attached as Exhs. A, B, C, and D,
respectively.

1 eyesight.” *Id.* at ¶ 5.

2 In its February 19, 2009 order, this Court found that Dr. Bowers’ expert testimony
3 concerning the physical symptoms exhibited by individuals who use anabolic steroids and HGH
4 was admissible, pending evidence that the defendant “developed some of the symptoms Dr.
5 Bowers will describe.” Docket #137 at 20.

6 ARGUMENT

7 **I. Dr. Bowers’s expert testimony on the side effects of anabolic steroids and HGH 8 should not be limited to side effects actually observed in the defendant**

9 The defendant argues that Dr. Bowers should not be permitted to testify about side effects
10 of anabolic steroids and HGH that lay witnesses are unable to testify to observing in the
11 defendant. This argument misconstrues this Court’s order that the expert testimony is relevant
12 only if there is evidence that the defendant had some symptoms, and the defendant’s motion
13 should be denied.

14 In its February 19, 2009 order, this Court found that Dr. Bowers’s expert testimony on the
15 effects of performance enhancing drugs was only relevant if the government introduces evidence
16 that the defendant “developed *some* of the symptoms Dr. Bowers will describe.” Docket #137 at
17 20 (emphasis added). The Court’s order did not require that there be evidence that the defendant
18 developed *all* of the symptoms Dr. Bowers would describe, nor did the Court limit Dr. Bowers’s
19 testimony about side effects to symptoms observed in the defendant. The reason the Court did
20 not impose such a limitation is clear.

21 Fed. R. Evid. 104(b) notes that some evidence may only be relevant and therefore
22 admissible “upon the fulfillment of a condition of fact.” If the defendant exhibited none of the
23 symptoms Dr. Bowers would describe, Dr. Bowers’s testimony would not have any tendency to
24 prove that the defendant was using performance enhancing drugs, and would thus be irrelevant
25 and inadmissible under Fed. R. Evid. 401 and 402. However, so long as the defendant exhibited
26 some of the symptoms, Dr. Bowers’s testimony is relevant and admissible.

27 It makes no sense to artificially restrict Dr. Bowers’s testimony to conform to symptoms
28 observed in the defendant. The jury’s truth-seeking function would only be hampered if it were
not entitled to consider whether, for example, the defendant exhibited five of five possible

1 symptoms, or five of ten symptoms.

2 The United States anticipates being able to meet the Court's requirement. Although not
3 all-inclusive of evidence bearing on the defendant's symptoms of steroid usage, the following is
4 a summary of evidence that more than sufficiently establishes that the defendant exhibited some
5 of the symptoms that Dr. Bowers will testify are side effects of the use of anabolic steroids and
6 HGH:

7 1) **Kimberly Bell.** Bell maintained a long-term intimate relationship with the defendant
8 from approximately 1994 to approximately 2003. Bell will testify that she noticed a number of
9 physical changes in the defendant, including bloating, acne on the back and shoulders, shrinking
10 of the testicles, sexual performance-related issues, an increase in the size of the defendant's
11 physique and muscles, and hair loss on his body and head. Bell will also testify that the
12 defendant engaged in angry, threatening, and violent conduct in her presence and in voice mail
13 messages he left for her.

14 2) **Stan Conte.** Conte was a trainer for the San Francisco Giants who worked with the
15 defendant. Conte will testify that the defendant's head appeared to get bigger between 1999 and
16 2001. Conte will testify that during the same time period, the defendant's physique and muscles
17 became noticeably bigger, and that he was "ripped," *i.e.*, that he had striking muscle definition
18 and very low body fat. Conte further noticed acne across the defendant's upper back and
19 shoulders, something he found unusual in a man of the defendant's age.

20 3) **Arthur Ting.** Ting, a personal physician to the defendant, will testify to observing a
21 tendon injury suffered by the defendant in 1999. Ting will further testify to noticing the
22 defendant and Anderson lifting weights and to the defendant getting noticeably bigger in terms of
23 his physique and muscles.

24 4) **Steve Hoskins.** Hoskins, a close associate of the defendant, will testify that the
25 defendant's physique, muscles, hands, feet, and head grew during the period of his drug use.
26 Hoskins will also testify that a conversation he recorded with Anderson included a discussion of
27 the injections of anabolic steroids into the defendant, and the possible side effects of those
28 injections, including cysts, puddling, and infections.

1 5) **Mike Murphy.** Murphy, the longtime equipment manager for the Giants, will testify
2 that the defendant's hat size increased from a size 7-1/4 to a size 7-3/8.

3 6) **Blood Test Results from the San Francisco Giants.** These test results will
4 demonstrate that Bonds's liver showed a change in liver values consistent with steroid use.

5 This Court should deny the defendant's motion to limit Dr. Bowers's expert testimony on
6 the side effects of performance enhancing drugs to side effects actually observed in the
7 defendant.

8 **II. The defendant's expert's opinions have no bearing on the admissibility of the**
9 **government's evidence**

10 Somewhat at odds with his position that Dr. Bowers's testimony should be constrained to
11 what was actually observed in the defendant, the defendant asks this Court to exclude Bell's
12 testimony concerning the size of the defendant's testicles, sexual performance, bloating, hair
13 growth on chest, anger and violence, and male pattern balding. Def. Mot. *In Limine* Two at 6-9.
14 He also asks this Court to exclude any testimony from Conte and Ting based on the alleged
15 inadequacy of the government's description of their testimony in its witness list. *Id.* at 9.
16 Contrary to the defendant's contention, the probative value of such testimony – even if contested
17 by the defendant and his expert – is not substantially outweighed by the danger of unfair
18 prejudice under Fed. R Evid. 403.

19 **A. Bell's testimony will be based on her personal relationship with the**
20 **defendant**

21 The defendant argues that Bell's testimony about her personal observations and
22 interactions with the defendant lack foundation. Def. Mot. *In Limine* Two at 7. On the contrary,
23 Bell will testify that as the defendant's intimate partner, she was in a position to make the
24 observations that she did.

25 **B. Lack of corroboration is not a ground for excluding evidence**

26 The defendant argues that Bell's testimony should be excluded because it cannot be
27 corroborated. *Id.* That a particular witness was uniquely situated to make observations does not
28 make her evidence inadmissible. Lack of corroboration goes to the weight of the evidence, not to
its admissibility. See *Walters v. McCormick*, 122 F.3d 1172, 1175 (9th Cir. 1997) (finding that

1 even if “finder of fact might well look with scepticism on her testimony,” witness’s testimony
2 was admissible). Moreover, while no other government witnesses may testify regarding the
3 defendant’s gonads and sexual functioning, other witnesses may testify to symptoms in the
4 defendant such as his anger and violence and balding.

5 **C. Evidence should not be excluded simply because the defendant may choose to**
6 **call witnesses to refute it**

7 The defendant also argues that Bell’s testimony should be excluded because it will
8 necessitate refutation by defense witnesses. *Id.* By this logic, any evidence that is probative of
9 the defendant’s guilt – which the defendant would seek to refute – should be excluded. That is
10 not the way the Federal Rules of Evidence work.

11 **D. Dr. Bowers’s testimony on side effects is not limited to those specifically**
12 **enumerated in Rule 16 disclosures**

13 The defendant argues that Bell’s testimony should be excluded where it does not accord
14 with Dr. Bowers’s anticipated testimony. *Id.* at 6-7. The defendant claims that because Dr.
15 Bowers’s disclosures do not specifically mention sexual performance and bloating as side effects
16 of steroids and HGH, Bell’s testimony regarding these observed changes in the defendant should
17 be excluded. The premise of the defendant’s argument is that Dr. Bowers may not testify to side
18 effects that have not specifically been enumerated in expert disclosures. This premise is false.

19 The Advisory Committee Notes to Fed. R. Crim. P. 16 explains that to “to minimize
20 surprise that often results from unexpected expert testimony, reduce the need for continuances,
21 and to provide the opponent with a fair opportunity to test the merit of the expert’s testimony
22 through focused cross-examination,” Rule 16(a)(1)(G) entitles the defendant to a “summary” of
23 the government’s expert witness testimony.” Fed. R. Crim. P. 16, 1993 Amend. Advisory
24 Committee Note. The summary must inform the defendant “whether the expert will be providing
25 only background information on a particular issue or whether the witness will actually offer an
26 opinion.” *Id.* There is no requirement that the disclosure give a more detailed accounting.

27 In *United States v. Basinger*, 60 F.3d 1400, 1407 (9th Cir. 1995), the Ninth Circuit
28 explained that even if the defendant did not receive an expert disclosure in compliance with Rule
16, his substantial rights were not affected. This was because defendant was informed of what

1 disclosure is meant to convey – that the expert would testify about testing of controlled
2 substances found at the site, and the red phosphorous method of methamphetamine production.
3 *Id.* The Ninth Circuit did not find that the defendant was entitled to know the precise testimony
4 the expert would give.

5 As another court in this district stated, “Rule 16(a)(1)(G) does not require recitation of the
6 chapter and verse of the experts’ opinions, bases and reasons. No rule, statute or decision
7 necessitates such comprehensive disclosure.” *United States v. Cerna*, No. Cr 08-0730 WHA,
8 2010 WL 2347406, at *2 (N.D.Cal. June 8, 2010); *see also United States v. Nacchio*, 555 F.3d
9 1234, 1262 (10th Cir. 2009) (en banc) (McConnell, J., dissenting) (observing that Rule 16’s
10 requirement of written summary “falls far short of the ‘complete statement’ requirement of
11 litigants in civil cases” per Fed. R. Civ. P. 26(a)(2)(B)(i)).

12 The United States’s disclosures regarding Dr. Bowers’s anticipated testimony amply meet
13 the requirements of Fed. R. Crim. P. 16. *See supra* Facts. These disclosures indicate that Dr.
14 Bowers will testify about the side effects of steroid and HGH use, including specifically
15 enumerated side effects. Among the enumerated side effects is liver and organ damage, a
16 symptom of which is bloating. Among the enumerated side effects is impact to a user’s genitalia,
17 which clearly contemplates effects on sexual performance. But, in any case, the list of side
18 effects is not exclusive, and the defendant is aware of the literature and bases for Dr. Bowers’s
19 opinions on the matter. The defendant is therefore on notice to the full panoply of side effects to
20 which Dr. Bowers may testify. Moreover, the defendant is obviously aware from the United
21 States’s filings that it intends to introduce evidence of the defendant’s erratic sexual drive/sexual
22 performance and bloating as side effects of the defendant’s steroid use. Bell’s observations of
23 these symptoms is relevant to the trial, and there is no surprise to the defendant.

24 **E. Evidence pertaining to gonads and sexual functioning is not unduly
25 prejudicial**

26 There is also no merit to the defendant’s suggestion that Bell’s testimony about the
27 defendant’s gonads or sexual impairment should be excluded under Fed. R. Evid. 403. Def. Mot.
28 *In Limine* Two at 7. The observations are of physiological changes to the defendant, no more
prejudicial than observations of other physiological changes, such as to the size of the

1 defendant's head and feet.

2 **F. The defendant's disagreement with the government's expert witness is not**
3 **grounds for excluding evidence**

4 The defendant argues that because his expert witness, Dr. Ronald Swerdloff, a
5 reproductive endocrinologist, may disagree with the government's expert witness, Dr. Bowers, a
6 specialist in athletic drug testing, on the side effects of using steroids to enhance athletic
7 performance and their observability, the government should be prohibited from introducing
8 evidence that the defendant exhibited such side effects. *See* Def. Mot. *In Limine* Two at 6-9.
9 This argument is meritless. Whether a percipient witness's observations accord with the
10 defendant's expert's opinion has no bearing on the former's relevance and admissibility.

11 The defendant states that because Dr. Swerdloff believes it would be difficult to discern
12 diminishment of the testes,² Bell should be precluded from testifying about her perception that
13 the defendant's testicles decreased in size. *Id.* at 7. He also claims that because Dr. Swerdloff
14 says that there is no science that steroids would cause the defendant to grow hair on his chest or
15 the defendant's head to bald, Bell may not testify about such hair growth or loss. *Id.* at 7-8.
16 Finally, the defendant states that because Dr. Swerdloff believes that anger and violence as a side
17 effect of steroid use is "controversial" and "decidedly mixed," witnesses should not be permitted
18 to testify about the defendant's behavior. *Id.* at 8.

19 As the Ninth Circuit has observed, "experts in every scientific field routinely disagree."
20 *Earth Island Istitute v. Carlton*, 626 F.3d 462 (9th Cir. 2010) (internal quotation and citation
21 omitted). It is not for this Court to decide whether the defendant's expert or the government's is
22 correct, but for the jury. *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985), *overruled in*
23 *part on other grounds*, *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997) (en banc). This
24 Court may not exclude otherwise admissible evidence simply because the defendant's expert
25 disagrees that it is probative. *See United States v. Vela*, 624 F.3d 1148, 1150 (9th Cir. 2010)
26 (noting that defendant's expert testified that he was insane, while government's expert testified

27
28 ² Dr. Swerdloff's actual opinion states that "an untrained layperson *might* have difficult
discerning it even by touch." *See* Docket #222-1 at ¶ 4.c (emphasis added).

1 that defendant was not legally insane but only severely depressed); *Goldman v. Standard Ins. Co.*,
2 341 F.3d 1023, 1036 (9th Cir. 2003) (declining to grant summary judgment where one parties'
3 expert evidence, disputed by opponent's expert, was sufficient).

4 While Dr. Swerdloff's opinions may form the basis for cross-examination and argument,
5 it has no bearing whatsoever on the admissibility of evidence. Dr. Bowers has indicated that he
6 will testify that steroid use can lead to increased hair growth on the trunk and extremities, male
7 pattern baldness, decrease in testicular size, and increased aggressiveness. Docket #128-1 at ¶¶
8 3, 4d, 4g. This makes evidence that the defendant exhibited these symptoms relevant. The stated
9 disagreements between Dr. Swerdloff and Dr. Bowers may be based on different types of studies
10 or other variables which can only be fleshed out at trial. The government's ability to call
11 percipient, firsthand witnesses such as Bell, Conte, Ting, and S. Hoskins cannot be vitiated by
12 the defendant's expert's declaration on his views of steroids; if that were true, trials would
13 simply become battles of paid experts expressing their perspectives on witness testimony. There
14 is no evidence that Dr. Swerdloff has even examined or met the defendant. His views cannot
15 substitute for their firsthand observations. Dr. Swerdloff's opinions are not a proper basis for
16 excluding otherwise admissible evidence.

17 CONCLUSION

18 For the foregoing reasons, the defendant's motions to limit Dr. Bowers's expert testimony
19 and to exclude lay witness observations of the changes in the defendant should be denied.

20 DATED: February 22, 2011

Respectfully submitted,

21 MELINDA HAAG
22 United States Attorney

23 /s/
24 _____
25 MATTHEW A. PARRELLA
26 JEFFREY D. NEDROW
27 MERRY JEAN CHAN
28 Assistant United States Attorneys