UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**Criminal No. 09-MJ-077 (AK)**
	:	
v.	:	
	:	
MIGUEL O. TEJADA,	:	
	:	
Defendant.	:	

GOVERNMENT'S MEMORANDUM IN AID OF SENTENCING

The United States of America, by and through its counsel, the United States Attorney for the District of Columbia, hereby submits this memorandum in aid of sentencing of defendant Miguel O. Tejada. On February 11, 2009, defendant pleaded guilty to one count of making misrepresentations to Congress in violation of Title 2 United States Code, section 192. For the reasons set forth herein, defendant should be sentenced at the low end of the applicable Sentencing Guideline range – in this case a Zone A sentence of probation – and be required to pay an appropriate fine.

I. FACTUAL BACKGROUND[1]

Since 1997, defendant has played professional baseball at the Major League level, first as a member of the Oakland Athletics (1997-2003), then as a member of the Baltimore Orioles (2004-2007), and presently as a member of the Houston Astros. Major League Baseball ("MLB") has banned the use of drugs without a valid prescription since at least 1991.[2] At all relevant times, the

[1]In connection with this plea agreement, defendant signed a written Statement of Offense (docket entry 6) which serves as the primary source for the information set forth in this section.

[2]On June 7, 1991, then MLB Commissioner Fay Vincent issued a memorandum that set forth MLB's drug policy. The memorandum stated: "The possession, sale or use of any illegal drug or controlled substance by Major League players or personnel is strictly prohibited. . . . This prohibition applies to all illegal drugs . . . including steroids or prescription drugs for which the individual in possession of the drug does not have a prescription." Major League Baseball, Commissioner's

use of steroids by MLB players was banned by MLB, and, in August of 2002, an explicit steroid prohibition was added to the players' collective bargaining agreement. In or about January of 2005, human growth hormone ("HGH") was explicitly added to the list of prohibited performance enhancing substances for players in MLB.

Public awareness of the risks and dangers associated with the use of performance enhancing drugs grew dramatically in the early 2000's. In connection with its law making function, the United States Congress attempted to gather factual information about the use and potential dangers of performance enhancing drugs in MLB. On March 17, 2005, the Committee on Oversight and Government Reform ("Committee"), House of Representatives, Congress of the United States ("Congress"), held a hearing here in Washington entitled "Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use." Congress had the Constitutional power to investigate, among other things, the use of performance enhancing drugs, including steroids and HGH, in MLB. The Committee was duly empowered to conduct the investigation, and the inquiry concerning the use of performance enhancing drugs was in the scope of the grant of authority.

During this March of 2005 hearing, former Baltimore Orioles baseball player Rafael Palmeiro appeared before the Committee and testified under oath that he had never used steroids. Palmeiro's denial of steroid usage was clear and unambiguous. Four and half months later, on August 1, 2005, MLB announced that Palmeiro had violated the MLB's Joint Drug Prevention and Treatment Program and would be suspended for 10 days. Palmeiro subsequently acknowledged that he had

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Memo on Baseball's Drug Policy and Prevention Programs (1991).

tested positive on May 4, 2005, for the banned anabolic steroid stanozolol, the generic name for Winstrol.[3] After learning of Palmeiro's positive test results, the Committee, pursuant to the authority of Congress and the Committee, opened an investigation to determine whether or not to refer Palmeiro's sworn testimony to the United States Department of Justice for further investigation and possible prosecution for perjury.

On August 25, 2005, during the follow-up investigation by the Committee, in a transcribed interview by Committee staff, Palmeiro denied knowingly using steroids. Palmeiro insisted that the positive steroid test could have resulted from use of an injectable form of vitamin B-12 that he claimed he received from his teammate, defendant Tejada, in mid-April of 2005. Palmeiro stated to Committee staff members that defendant offered him the B-12 and told him that the shots gave him energy. Palmeiro told Committee staff members that he believed that the B-12 injection was contaminated and blamed this contamination for his positive test for steroids.

Based on Palmeiro's claim that defendant was the apparent source of the steroids in Palmeiro's system, Committee staff the next day (August 26, 2005) conducted a transcribed interview in Baltimore, Maryland, of defendant, in the presence of his attorney and a Spanish language interpreter. Before the questioning began, Committee staff told defendant and the others present that "[t]he chairman and the ranking member [of the Committee] want to express their appreciation for your cooperation with the committee[.]" The Committee staff also told defendant that they were there "to ask questions regarding substances that you may have supplied to Rafael Palmeiro and related matters." And while defendant was not placed under oath, the Committee staff advised him of the importance of providing truthful answers.

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[3]Winstrol, a synthetic derivative of testosterone, is recognized as a highly potent steroid.

As part of the August 26, 2005, interview, defendant was generally questioned by Committee staff about, among other things, his knowledge of MLB players, including himself, discussing or using steroids and other banned performance enhancing substances. Defendant told the Committee staff that he never used illegal performance enhancing drugs and that he had no knowledge of other players using or even talking about steroids or other banned substances.

During the August 26, 2005, interview, Committee staff asked defendant specifically about his awareness of any discussions among baseball players about steroids:

Committee Staff:	Has there been discussions among other players about steroids?
TEJADA:	No, I never heard.
Committee Staff:	You never heard any of that?
TEJADA:	No.

Committee staff also asked defendant whether he knew any other player on the Oakland Athletics who used steroids:

Committee Staff:	When you were playing with the Oakland A's, they had a reputation in some places as a place where a lot of players used steroids; were you aware of that?
Interpreter:	In the big leagues or in the minor leagues?
Committee Staff:	Big leagues.
TEJADA:	No.
Committee Staff:	You never knew of any other player using steroids?
TEJADA:	No.
Committee Staff:	Or just that it was even an issue for some players? [The question was translated by the interpreter.]
TEJADA's attorney:	Are you suggesting when he was playing with Oakland or today?
Committee Staff:	When he was playing? [The question was translated by the interpreter.]
TEJADA:	I didn't know any player.

At the conclusion of its 2005 investigation, the Committee declined to make a perjury referral of Palmeiro to the Department of Justice. See Report on Investigation Into Rafael Palmeiro's March 17, 2005 Testimony Before the Committee on Government Reform,

http://oversight.house.gov/documents/20051110131404-84326.pdf. On November 9, 2005, the Committee issued a report in which it concluded that "[a] referral for perjury is a serious step. The evidence before the Committee is insufficient to merit a perjury referral." Id. at 42.

The matter was resurrected upon the release of the Mitchell Report in December, 2007,[4] which contained information that contradicted material portions of defendant's August 2005 statement to the Committee staff. Indeed, as set forth in the stipulated statement of offense, we now know that in the spring of 2003, another player on the Oakland Athletics (referred to as "player #1" throughout this matter) had a locker nearby that of defendant's in the Athletics's clubhouse. Defendant mentioned to player #1 that he looked in great shape physically and asked player #1 what he was doing to help him be in such good physical shape.

As a result of these conversations, during spring training in 2003, defendant and player #1 had several conversations about player #1 using steroids and HGH. Subsequently, defendant provided player #1 with two checks, both dated March 21, 2003, in the amounts of $3,100 and $3,200 respectively, for substances which defendant believed to be HGH. Player #1 did not know whether defendant actually used the substances that he purchased from player #1. Defendant claims that, after purchasing these substances, he had second thoughts about them and, instead of using them, simply discarded them. The United States has insufficient evidence to contradict defendant's claim concerning his non-usage of the material.

On January 15, 2008, in light of the evidence in the Mitchell Report, the Committee

[4]On December 13, 2007, former United States Senator George J. Mitchell issued a 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" ("The Mitchell Report").

requested the United States Department of Justice investigate whether defendant "made knowingly false statements to the Committee[.]" The Committee stated that it was "especially concerned about the veracity of Mr. Tejada's statements because they materially influenced the course of the Committee's investigation in 2005." The United States Attorney for the District of Columbia, in conjunction with the FBI and other investigators, carried out this request which culminated in defendant's guilty plea before the Court.

II. ANALYSIS

A. The Plea Agreement

Defendant entered into a written plea agreement with the United States (docket entry 5). The charge to which defendant pleaded guilty – making misrepresentations to Congress – carries a statutory maximum penalty of one year imprisonment. Plea Agreement dated 2/5/09 ("PA"), ¶ 1. Under the terms of the plea agreement, the parties and the United States Probation Office ("USPO") agree that sentencing in this case is governed by United States Sentencing Guidelines ("U.S.S.G.") § 2X5.2. Id., ¶ 3A; see also Presentence Report ("PSR"), ¶ 24. Section 2X5.2 carries a base offense level of 6 and there are no applicable enhancements. PA, ¶ 3A; PSR, ¶¶ 24-30. Defendant admitted his misrepresentations to Committee staff and has clearly accepted responsibility for his conduct. This is a pre-indictment plea and, pursuant to the terms of the agreement, defendant is entitled to a two level reduction for his early acceptance of responsibility. PA, ¶ 3B; PSR, ¶ 31.

The stipulated Guideline Offense Level in this case is 4. PA, ¶ 3B; PSR, ¶ 32. Defendant – who has never been arrested and has no prior criminal history – is in Criminal History Category I. PSR, ¶ 35. The stipulated Sentencing Guideline range here is 0 to 6 months in prison. PA, ¶ 3D; PSR, ¶ 62. As part of the plea agreement, and in consideration of defendant's early acceptance

of responsibility and the entire record in this matter, the government does not oppose defendant's request for sentencing at the low end of the Guideline range. PA, ¶ 7. Defendant is eligible for a sentence of probation. PSR, ¶¶ 68, 69. The statutory maximum fine is $100,000 and the stipulated Sentencing Guideline range for a fine in this case is $250 to $5,000.[5] PA, ¶ 3D; PSR, ¶¶ 71, 73.

B. Defendant Should be Sentenced at the Low End of the Guideline Range.

Title 18 United States Code, section 3553(a), sets forth the relevant factors that the Court shall consider in sentencing a defendant. We discuss those factors as they apply to this case.

The Constitution of the United States imbues the United States Congress with special authority to conduct investigations and inquiries that are important – and indeed, many times critical – to carrying out its law making responsibilities. See Watkins v. United States, 354 U.S. 178, 187 (1957) ("The power of Congress to conduct investigations is inherent in the legislative process. That power is broad.").[6] Every year and at any given time that Congress is in session, Senate and House Committee members and their staffs speak with hundreds of individuals in an effort to gather information that is important to the functioning of the United States government.[7] These individuals

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[5]As the PSR notes, the maximum fine here is governed by 18 U.S.C. § 3571(b)(5) and (e) and is $100,000. See PSR, ¶ 71. This is a higher figure than what was set forth in the plea agreement although the stipulated fine range under the Sentencing Guidelines remains unchanged.

[6]See also McGrain v. Dougherty, 273 U.S. 135, 174 (1927) ("We are of the opinion that the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function."); Howard R. Sklamberg, *Investigation versus Prosecution: The Constitutional Limits on Congress's Power to Immunize Witnesses*, 78 N. Car. L. Rev. 153, 181-187 (1999) (discussing Congress's power to investigate).

[7]The House Committee on Oversight and Government Reform – the Committee to which defendant provided false information – has since the time of this criminal referral to the Justice Department held 32 separate hearings in which witnesses provided material information. Those hearings touch upon some of the most vital interests to the United States and, for example, include:

are either placed under oath or, as in Mr. Tejada's case, cautioned about the need to provide truthful information. The individuals then have a clear choice to make: they can choose to be completely honest or they can choose to be dishonest, dissemble, omit material information, or mislead.[8] Those who choose the path of honesty often do so at their own personal detriment: they may be required to reveal information that is embarrassing, unflattering, or holds them open to ridicule or scathing criticism whether that rebuke is justified or not. These disincentives notwithstanding, Congress demands and expects that individuals will make the right choice and tell the truth about what they know. See Watkins v. United States, supra, 354 U.S. at 187-188 ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province

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- "How Convicts and Con Artists Receive New Federal Contracts" (February 16, 2009);
- "The Role of Fannie Mae and Freddie Mac in the Financial Crisis" (December 9, 2008);
- "The Financial Crisis and the Role of Federal Regulators" (October 23, 2008);
- "Credit Rating Agencies and the Financial Crisis" (October 22, 2008);
- "Impact of Proposed Legislation on the District of Columbia's Gun Laws" (September 9, 2008);
- "Deficient Electrical Systems at U.S. Facilities in Iraq" (July 30, 2008);
- "Business Practices in the Individual Health Insurance Market: Terminations of Coverage" (July 17, 2008);
- "Accountability Lapses in Multiple Funds for Iraq" (May 22, 2008);
- "The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 2" (February 13, 2008); and
- "Myths and Facts About Human Growth Hormone, B-12, and Other Substances" (February 12, 2008).

See http://oversight.house.gov/hearings.asp.

[8]Witnesses do of course have the right to exercise their fifth amendment privilege against compelled self-incrimination, a right that was available to defendant. See Watson v. United States, supra, 354 U.S. at 188 ("Witnesses cannot be compelled to give evidence against themselves.").

of proper investigation."). Anything less erodes the legislature's ability to function as the Constitution prescribes.

When approached by Committee staffers in August of 2005, defendant made the wrong choice and this goes to the very heart of why criminal accountability was absolutely necessary here. It should serve as a clear notice to individuals who may otherwise believe that knowingly providing false or misleading information to Congress is a penalty-free exercise. It is important to understand that there are serious and lasting consequences for those who choose to withhold material information. Moreover, Mr. Tejada's federal criminal conviction vindicates the judgment of those who – often in the face of great personal hardship – make the right choice in telling the truth. There is one set of rules governing truthfulness that apply to everyone, and those rules apply equally and uniformly to all those who appear before Congress.

In considering the appropriate sentence in this case, the Court should consider that defendant – who is 34 years old – has had no prior contact with the criminal justice system. He overcame extremely difficult economic circumstances in his childhood and, through considerable effort and dedication, became distinguished in his chosen profession. Others in his profession have described him as hard working, caring, and willing to share his time and knowledge with younger players and members of the public. He has given back to the community in which he was raised. He has maintained steady employment as a professional baseball player since 1993 and has been able to earn a substantial amount of money, a portion of which he has given to his father and his extended family in the Dominican Republic. He continues his ability to work, earn a regular income, and make positive contributions to society.

Defendant has expressed appropriate remorse and contrition for this offense. He understands

the seriousness of it. Mr. Tejada poses a minimal risk of recidivism and, based on his public statements, appears to have learned a difficult and important life lesson from his experience in this case. He is entitled to an appropriate amount of credit for this.

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court impose a sentence at the low end of the applicable Guideline range, in this case a sentence of probation. As part of any probationary sentence, the government requests that the Court require defendant to complete a period of community service geared toward youth outreach and education.[9] The Court should further order that defendant pay a fine within the stipulated fine range as well as the special assessment of $25.

[9]In a prior prosecution in this District which resulted in a guilty plea to two counts under this same statute, the Court sentenced the defendant to a two year period of probation and ordered him to perform one hundred hours of community service. See In re Elliott Abrams, 689 A.2d 6, 9 (1997) (en banc).

Respectfully submitted,

JEFFREY A. TAYLOR
UNITED STATES ATTORNEY
D.C. Bar # 498610

By: /s/
_____
STEVEN J. DURHAM
Chief
IL Bar #6201108
DANIEL P. BUTLER
D.C. Bar # 417718
Assistant United States Attorneys
Fraud & Public Corruption Section
555 Fourth Street, N.W., 5th Floor
Washington, D.C. 20530
(202) 514-8316 and 353-9431
Steven.Durham@USDOJ.Gov
Daniel.Butler@USDOJ.Gov