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BARRY BONDS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiffs, vs. BARRY LAMAR BONDS, Defendants	Case No.: CR 07-0732 SI MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO REQUIRE GOVERNMENT TO PROVIDE INFORMATION ABOUT THE DECISION NOT TO PROSECUTE STEVEN HOSKINS Date: January 21, 2011 Time: TBA Judge: The Honorable Susan Illston

I. INTRODUCTION

Steven Hoskins is a key prosecution witness, perhaps the key prosecution witness. He is the sponsor of the purported recording of a conversation with Greg Anderson in the San Francisco Giants' clubhouse. He claims that he secretly recorded other conversations of interest to the Government. He is on the Government's Witness List as a person who

was so close to Barry Bonds that Mr. Bonds supposedly admitted steroid use to him.

The Government concedes that Mr. Hoskins was "the target of an investigation by the FBI concerning certain aspects of his business relationship with Barry Bonds." (Exhibit "A" to this Memorandum). But the discovery received to date shows that Hoskins and the Government quickly found common ground in pursuing allegations of steroid use by Mr. Bonds rather than theft and fraud by Hoskins. Indeed, when Hoskins was asked about "Bonds' steroid use," his attorney reminded Agent Novitzky and a BALCO prosecutor that "they had made it known to the Government in the past that Hoskins would be willing to discuss this issue."[1]

Hoskins legal situation quickly improved once he reaffirmed his interest in discussing alleged steroid use by Mr. Bonds. On November 2, 2005, Hoskins' lawyer was notified by the Government that "we will not be pursuing federal criminal charges against your client at this time." Thereafter Hoskins joined the prosecution team: He turned over the recorder with the purported clubhouse conversation, he introduced Agent Novitzky to his sister, who became a Government witness, he submitted to numerous interviews by Agent Novitzky, and he testified at the Grand Jury.

This Motion seeks information about the reversal of fortune enjoyed by Hoskins after he offered to help the Government in its pursuit of Mr. Bonds. The Government is plainly obliged to provide this information under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 Law Ed. 2nd 215 (hereafter "*Brady*"). Evidence tending to impeach a key prosecution witness must be turned over to the defense under *Brady*. See *Silva v. Woodford* (2002, CA 9 Cal.) 279 F.3d 825, 855; *Giglio v. United States* (1972) 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2nd 204, *United States v. Bagley* (1985) 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481:

> Impeachment evidence … as well as exculpatory evidence … falls within the *Brady* rule … such evidence is 'evidence favorable to an accused.' …

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[1] The quoted language is from the Government's report of its meeting with Hoskins on April 26, 2005. Reports of the Hoskins Interviews are not attached, because they were provided in discovery by the Government, and in this Motion the content of the interviews is not in dispute.

II. FACTS

Hoskins is a Key Prosecution Witness.

In its Witness List filed October 15, 2010, the Government says this about Hoskins:

> Mr. Hoskins will testify that he was childhood friends with the defendant and that in approximately late 1992 or early 1993, he began working for the defendant as his assistant. Mr. Hoskins will testify regarding the nature and extent of his working relationship with the defendant, which included handling many of the defendant's personal errands and scheduling, as well as managing the defendant's promotional activities related to his baseball career. During their relationship, Mr. Hoskins became aware that the defendant was using steroids with the assistance of his personal trainer, Greg Anderson. In this regard he will testify how he learned of the defendant's steroid use through, among other things, both the defendant's and Anderson's admissions to Hoskins. Mr. Hoskins will also testify about other aspects of his relationship with the defendant.

United States' Witness List, page 4, lines 14-23.

Exhibit 43 on the Government's Exhibit List is entitled "Dr. Ting Steroid Research Document" which is sponsored by Hoskins, as well Exhibit 44, described as "Recording of Conversation (Hoskins-Anderson) Transcript."

It seems unlikely that the Government will try to dispute the importance of Hoskins to the prosecution case.

Hoskins Received an Important Benefit from the Government When It Decided Not to Prosecute Him for Crimes Against Mr. Bonds and the Public.

This is best summarized by a brief chronology.

July 24, 2003 – Mr. Bonds went to the offices of the FBI in San Francisco to report a number of law violations by Hoskins. In a lengthy interview, Mr. Bonds explained to the agents and an assistant United States Attorney that Hoskins had committed acts of dishonesty and breaches of trust in connection with baseball-related memorabilia – apparel, bats and other items associated with Mr. Bonds' baseball career. The FBI began an investigation.

December 4, 2003 – Mr. Bonds testified before the BALCO Grand Jury.

October 29, 2004 – After conducting a number of other interviews, the FBI sought to interview Hoskins. Hoskins said that he was willing to speak to the agents, but he wanted to talk to his lawyer first. The interview terminated.

April 26, 2005 – Accompanied by his attorney, Michael Cordoza, Hoskins met with BALCO prosecutor Ross Nadel, IRS agents Novitzky and Rogers, and FBI agent Heather Young, who prepared a report of the interview. The meeting was conducted under a use immunity agreement. Hoskins spoke at length about Mr. Bonds' personal life, finances, and business. The interview report reflects the following:

> When investigators asked Hoskins about Bonds' steroid use, Cordoza advised that they had made it known to the Government in the past that Hoskins would be willing to discuss this issue. He also advised that Hoskins had an audio tape regarding a conversation about Bonds' steroid use, which they offered to make available to the Government.

The report shows that Hoskins went on to talk at length about Mr. Bonds' alleged drug use, and the purported "tape recordings" which he had made.

November 2, 2005 – The United States Attorney for the Western District of Washington sent a letter to Mr. Cardoza:

> As you know, your client Steven Hoskins has been the target of an investigation by the FBI concerning certain aspects of his business relationship with Barry Bonds. The matter was referred to this office under Department of Justice procedures because of a possible conflict that this investigation may have raised in the U.S. Attorney's Office in the Northern District of California.
>
> I am writing to inform you that our office's evaluation of the evidence has led to our determination that we will not be pursuing federal criminal charges against your client at this time. We are closing our file in this matter. This notice does not preclude our office, or the grand jury having cognizance over the investigation (or any other grand jury) from reinstituting such an investigation without notification to you or your client if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution. Please call me at ___ if you have any questions.

A copy of this letter is attached as Exhibit "A".

January 19, 2006 – Hoskins was interviewed again by Agent Novitzky and

others. The report reflects that "agents reviewed items that Hoskins indicated he could provide," including "a recording of Dr. Ting where he and Dr. Ting are discussing Bonds' steroid use ... Hoskins will locate the recording and provide it to agents ..." In this interview Hoskins apparently identified his sister as someone who "observed Bonds' drug use."

February 22, 2006 – Hoskins was interviewed again and apparently provided a digital recorder with recording on it to Agent Novitzky.

March 16, 2006 – Hoskins testified before the Grand Jury investigating Mr. Bonds.

March 17, 2006, July 16, 2006, July 17, 2006, December 10, 2007, February 26, 2009 – Hoskins was interviewed by Agent Novitzky and others.

Defendant Has Repeatedly Asked the Government for Information Concerning the Decision Not to Prosecute Hoskins.

Defense counsel have informally tried again and again to obtain information about how and when the Hoskins case made its way to Seattle, and the bases for the decision not to prosecute Hoskins. On January 20, 2009, defense counsel asked for "documents comprising the referral of Mr. Bonds' report of law violations to federal authorities in Seattle, Washington." On February 24, 2009, defense counsel asked the Government for "documents comprising the referral of Mr. Bonds' report of law violations by Stevie Hoskins to federal authorities in Seattle, Washington, as well as documents showing that prosecution was declined." Substantially the same requests were repeated on August 24, 2010 and September 8, 2010.

In response the Government provided Exhibit "A", the letter of November 2, 2005, but no other document which appears to be associated with the referral to Seattle and the decision there. The Government has provided reports of interviews with Hoskins conducted in the Northern District of California, but whether some, all or none of those reports were provided to the prosecutors in Seattle is unknown to the defense. If these

reports were furnished to the Seattle prosecutors, presumably it would be a simple matter for the Government to provide the transmittal documents.

The Government's response to repeated requests for documents pertaining to the nonprosecution of Hoskins is summed up in their letter to defense counsel of August 30, 2010:

> Preliminarily, the government notes that it does not concur with your characterization that it "elected not to prosecute Steven Hoskins, but rather to use him as a witness." As you are well aware, this office recused itself from the investigation and the ultimate decision was made by the United States Attorney's Office in Seattle, Washington. Mr. Hoskins is a witness because he has direct evidence of the Defendant's perjury and obstruction of justice, not because – as you infer – he struck a deal with this office. You previously made this request on January 20, 2009, and February 24, 2009. The government responded in writing and produced responsive documents on February 10, 12 and 24, 2009.

The Government produced documents on February 10 and February 12, 2009, and perhaps February 24, 2009, but the defense cannot discern that these documents – except for the November 2 letter – have anything to do with the decision (agreement?) not to prosecute Hoskins.

III. ARGUMENT

A. Evidence of Leniency to a Key Prosecution Witness Must be Provided to the Defense.

There is no question that Hoskins received a benefit from the Government. The prosecutor's letter of November 2, 2005, confirms that he was the target of a criminal investigation, and that the Government had decided not to pursue criminal charges, although the decision not to prosecute could be revisited in the future (during Hoskins' cooperation with the Government).

> Promises, offers, benefits and inducements extended to prosecution witnesses can undermine the credibility of those witnesses, and evidence of these promises, offers, benefits and inducements constitute evidence favorable to the defendant pursuant to *Brady v. Maryland* ...

Pipes & Gagen, *California Criminal Discovery* (4th Ed. 2008) §1:29 at p. 72. Whether the decision not to prosecute Mr. Hoskins was part of an express or implied agreement will be a jury question. The defense, however, is entitled to know, prior to trial, all of the circumstances surrounding the nonprosecution. When was the Hoskins case referred to the Western District of Washington? Did the Washington prosecutors conduct their own investigation, or did they rely exclusively on information sent to them by Agent Novitzky and the BALCO prosecutors? How exactly did the Hoskins case get from Northern California to Seattle – presumably there are transmittal documents explaining or at least recognizing the "possible conflict that [the Hoskins] investigation may have raised in the U.S. Attorney's Office in the Northern District of California." The defense has no information on these subjects.

In *United States v. Shaffer*, 789 F.2d 682 (1986 CA 9 Cal.) there was circumstantial evidence that "could be construed to imply a tacit agreement between Durand [a government witness] and the Government that the Government would not proceed against Durand in a civil forfeiture action." *Id.* at page 690.

After his conviction, the defendant challenged the Government's failure to disclose evidence pertaining to the civil forfeiture liability of Durand. The Government responded that "because there was no explicit agreement on this matter, it had nothing to disclose." *Id.* at page 690. The Ninth Circuit held otherwise:

> While it is clear that an explicit agreement would have to be disclosed because of its effect on Durand's credibility, it is equally clear that facts which imply an agreement would also bear on Durand's credibility and would have to be disclosed ... The failure to disclose the extent of Durand's assets is exculpatory material that could indicate the 'tip of the iceberg' of a secret deal of leniency.

Id. at pp. 690-691.

Finally,

> A prosecutor's intervention on behalf of a prosecution witness need not be an express *quid pro quo* for the witness's testimony in order for the prosecutor's actions to be disclosable as evidence favorable to the defendant.

California Criminal Discovery, *supra*, §1:29.7 at page 85, citing *Belmontes v. Woodford* (2003, CA 9 Cal.) 335 F.3d 1024, 1043.

B. Mr. Bonds is Entitled At Least to (a) All Investigation Reports and Other Documents Which Formed the Basis for the Decision Not to Prosecute Hoskins, (b) Any Communications Concerning Hoskins from Investigators and Attorneys in the Northern District of California to Law Enforcement in the Western District of Washington or Elsewhere, and (c) Any Other Information Concerning the Decision Not to Prosecute Hoskins.

The Government's refusal to provide discovery on the decision not to prosecute Hoskins is puzzling. It is obviously relevant to Hoskins' credibility. The letter of November 2, 2005, raises as many questions as answers. Presumably the United States Attorney in Seattle reviewed something – reports, physical evidence, tape recordings perhaps – before writing the letter. Or perhaps not – maybe Agent Novitzky briefed the Seattle prosecutors on the case against Hoskins. Or perhaps the Seattle prosecutors interviewed Hoskins themselves, or asked other agents to do investigative work.

What we know for certain is that a few months after Hoskins met with Agent Novitzky and a BALCO prosecutor, and renewed his offer to talk about Mr. Bonds and steroids, Hoskins' legal problems went away. Because Hoskins will be an important prosecution witness at trial, the prosecution must disclose all the facts and documents which explain the decision not to prosecute him.

IV. CONCLUSION

For the reasons stated above, Mr. Bonds respectfully requests an order that the Government promptly provide:

1. All investigation reports and other documents which formed the basis for the decision not to prosecute Hoskins;

2. Any communications concerning Hoskins from investigators and attorneys in the Northern District of California to law enforcement in the Western District of Washington or elsewhere; and

3. Any other information concerning the decision not to prosecute Hoskins.

/////

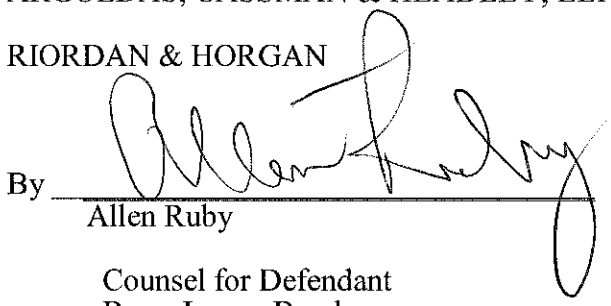
Dated: December 17, 2010

Respectfully submitted,

LAW OFFICES OF ALLEN RUBY

ARGUEDAS, CASSMAN & HEADLEY, LLP

RIORDAN & HORGAN



By _____
Allen Ruby

Counsel for Defendant
Barry Lamar Bonds

EXHIBIT A

U.S. Department of Justice

United States Attorney
Western District of Washington

Please reply to:
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Assistant United States Attorney
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November 2, 2005

VIA FAX 925-274-2910

Michael Cardoza
The Cardoza Law Offices
1111 Civic Drive, Suite 320
Walnut Creek, California 94596

Dear Mr. Cardoza:

As you know, your client Steven Hoskins has been the target of an investigation by the FBI concerning certain aspects of his business relationship with Barry Bonds. The matter was referred to this office under Department of Justice procedures because of a possible conflict that this investigation may have raised in the U.S. Attorney's Office in the Northern District of California.

I am writing to inform you that our office's evaluation of the evidence has led to our determination that we will not be pursuing federal criminal charges against your client at this time. We are closing our file in this matter. This notice does not preclude our office, or the grand jury having cognizance over the investigation (or any other grand jury) from reinstituting such an investigation without notification to you or your client if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution. Please call me at 206-553-4113 if you have any questions.

Yours truly,

JOHN McKAY
United States Attorney

MARK PARRENT
Assistant United States Attorney