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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. )

No. CR 07-0732-SI

**UNITED STATES' OPPOSITION TO  
 DEFENDANT'S MOTION IN LIMINE  
 TO EXCLUDE EVIDENCE**

Date: January 21, 2011  
 Time: 11:00 a.m.  
 Judge: Honorable Susan Illston

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## I. INTRODUCTION

1  
2 The United States opposes defendant Barry Bonds's December 17, 2010 motion in  
3 limine, which seeks to exclude witnesses and exhibits far above and beyond the scope of this  
4 Court's February 19, 2009 order. That February 2009 order held that unless Anderson testified at  
5 trial, the Court would exclude on relevance grounds test results for urine and blood specimens  
6 found at Balco and linked to Bonds, Balco ledgers referencing Bonds, and calendars referencing  
7 Bonds found at Balco and at Anderson's residence. The Court found that Anderson's statements  
8 to Balco vice-president James Valente identifying the specimens as belonging to Bonds were  
9 inadmissible hearsay which could not support admission of the test results and the ledgers. The  
10 Court excluded the test results and the ledgers because, without Anderson's statements, the Court  
11 concluded that the government could not sufficiently tie the test results and ledger entries to  
12 Bonds. The Court further excluded calendars and handwritten notes found at Anderson's  
13 residence based on a finding that those documents contained inadmissible hearsay.

14 The hearsay issues largely arose because Anderson, Bonds's former trainer and drug  
15 supplier, illegally refused to testify in the grand jury on multiple occasions. Anderson appears  
16 intent on continuing his illegal refusal to testify at trial, thereby depriving the government of the  
17 necessary predicate for the documents' admission. While the Court found that the documents  
18 were inadmissible on relevance and hearsay grounds, the Court expressly acknowledged in its  
19 order that the government might be able to introduce these documents if it made a sufficient  
20 showing that the materiality demonstrated by the documents could not be "easily proven through  
21 another means." Court's Order at 20-21. In light of this possibility, the government maintained  
22 the excluded exhibits on its exhibit list.

23 The defense claims in its motion that it only seeks to "conform" the government's  
24 evidence with the Court's prior order. In truth, the instant motion seeks to expand the Court's  
25 order beyond its original scope, and thereby to exclude exhibits and witnesses that were not part  
26 of the defense's prior motion. In so doing, the motion seeks to foreclose the possibility of  
27 admitting the excluded documents to demonstrate materiality, a possibility that the Court  
28 explicitly acknowledged in its original order. The motion further seeks to foreclose government

1 witnesses from providing percipient witness testimony describing their contact with these  
2 documents, apparently based on the misperception that testimony relating to the documents  
3 necessarily constitutes hearsay. The motion also asks the Court to expand its prior ruling by  
4 redacting the indictment in this case. Not content with these already ambitious requests, the  
5 defense further asks the Court to redact approximately 1,000 lines from the defendant's grand jury  
6 transcript—approximately 40 pages worth of testimony—based on the novel, and unsupportable,  
7 premise that the Court's ruling to exclude the documentary evidence should be used to edit the  
8 grand jury transcript. The effect of this request would be to preclude the trial jury from hearing  
9 Bonds's responses to relevant, lawfully-posed questions pertaining to documents which had been  
10 lawfully seized, were a proper and legal subject of inquiry in the grand jury, were obviously  
11 material to the grand jury's inquiry, and were at the heart of the investigation into the illegal  
12 conduct of the Balco co-conspirators.

13 Defendant's motion should be denied. The government should be permitted to introduce  
14 the documents at issue for the non-hearsay purpose of demonstrating the materiality of Bonds's  
15 false and evasive statements. The government proposes redacting these documents to remove the  
16 references to steroids and other drugs in order to address the defense concern of the trial jury  
17 considering the inadmissible hearsay contained within the documents. In addition, the  
18 government would stipulate to a jury instruction informing the jury that they cannot consider the  
19 documents for any purpose other than materiality and to explain the background and context of  
20 the government's investigation. Even if the Court is not persuaded that redacted versions of the  
21 documents should be admitted for the limited purpose of proving materiality, witnesses who saw,  
22 handled, created, or received documents pertaining to Bonds and other athletes (Agent Novitzky,  
23 Balco vice-president James Valente, and the athlete-witnesses) should be permitted to provide  
24 relevant, non-hearsay testimony regarding their firsthand contact with these documents. The  
25 agents should be permitted to testify about what they found during the search warrants, and how  
26 the items they seized led to the decision to pursue the investigation through the issuance of a  
27 grand jury subpoena to Bonds and other athletes. Furthermore, athlete witnesses should be  
28 permitted to testify that Anderson provided them with documents in conjunction with telling

1 them that he was giving them steroids. Nothing in the Court's February 2009 ruling precludes  
2 such testimony.

3 Nor does the Court's ruling support the defense request to redact the indictment and to  
4 exclude over one-fourth of the grand jury transcript. The government properly questioned Bonds  
5 on the subject matter of these documents in the Balco grand jury, and the admission of the entire  
6 grand jury transcript is necessary for the trial jury to understand the context in which Bonds  
7 provided his false, evasive, and misleading statements. The fact that the documents referenced in  
8 the questioning may ultimately be excluded at trial on hearsay grounds has no bearing on the  
9 question of admitting the grand jury transcript; the references to the documents are not hearsay  
10 and are relevant to proving the charges in this case. The trial jury should therefore be permitted  
11 to hear a reading of the entire grand jury transcript.

## 12 II. FACTS

13 On September 3, 2003, as part of its investigation of the illegal steroid distribution  
14 activities of Balco Laboratories, the government executed a search warrant at the Balco business  
15 premises in Burlingame, California. Federal agents found documents indicating the illegal  
16 distribution of anabolic steroids and other performance-enhancing drugs to dozens of athletes.

17 Some of the documents seized from Balco indicated that the defendant was using Balco's  
18 services to determine whether anabolic steroids were detectable in his blood and urine. Agents  
19 found the results of numerous blood tests for the defendant. Agents further found a ledger that  
20 reflected a coding system in which the defendant's urine specimens were assigned numbers and  
21 then referred out for urine testing. The ledger and the drug test results found at Balco that  
22 corresponded to the numbers entered under the defendant's name on the ledger indicated that  
23 Bonds's urine tested positive for anabolic steroids on three separate occasions in 2000 and 2001.

24 At the time of the search, Victor Conte and James Valente, another Balco employee,  
25 voluntarily provided statements in which they identified Greg Anderson as a participant in the  
26 scheme. Based on these statements and corroborating documents found during the search, agents  
27 requested and received a separate search warrant for Anderson's residence. There, agents found  
28 handwritten notes, calendars, drug ledgers, and financial notes indicating that Bonds and other

1 athletes received and paid for illegal athletic performance-enhancing drugs from Anderson.  
2 Anderson voluntarily provided a statement in which he confessed to distributing anabolic  
3 steroids to several of the athletes; but when asked about documents containing references to  
4 Bonds, he declined to provide any further statements. Since that day, Anderson has illegally  
5 persisted in his refusal to explain his dealings with the defendant, even though doing so has  
6 resulted in him spending more than a year in jail. The documents from Anderson's residence  
7 provide a detailed record of steroid distribution from Anderson to Bonds from 2001 to 2003,  
8 with entries referring to injectable steroids, human growth hormone, and other drugs.

9 Bonds was called to testify before a grand jury investigating the steroid trafficking  
10 activities of Balco and Anderson on December 4, 2003. During Bonds's grand jury testimony,  
11 the government asked Bonds a series of questions about the drug test results, calendars, ledgers,  
12 and other documents seized from Balco and Anderson.

13 On February 12, 2004, a federal grand jury in the Northern District of California returned  
14 an indictment in *U.S. v. Conte et al.*, CR No. 04-044-SI, charging Anderson, Conte, Valente, and  
15 Remi Korchemny with, among other things, conspiring to illegally distribute anabolic steroids.  
16 On July 15, 2005, Conte and Anderson pleaded guilty to conspiring to distribute and to possess  
17 with intent to distribute anabolic steroids, among other charges. At his plea hearing, Anderson  
18 admitted that between December 1, 2001 and September 3, 2003, he engaged in a conspiracy  
19 with Conte and Valente to illegally distribute steroids and other performance enhancing drugs to  
20 athletes.

21 Bonds is charged with ten counts of making false declarations before the grand jury, in  
22 violation of 18 U.S.C. § 1623(a), and one count of obstruction of justice in violation of 18 U.S.C.  
23 § 1503.

24 The Court's February 19, 2009 order excluded on relevance grounds the test results on  
25 the urine and blood specimens and the BALCO ledgers. Without Anderson's testimony, the  
26 government could not conclusively establish that the specimens identified as belonging to Bonds  
27 actually came from Bonds. The Court found that Anderson's statements to Balco vice-president,  
28 and government witness, James Valente identifying the samples as Bonds's were inadmissible

1 hearsay. The Court further excluded as hearsay the calendars found at Balco and at Anderson's  
2 residence which bore Bonds's initials and appeared to outline a regimen for the administration of  
3 steroids and other drugs.

### 4 III. ARGUMENT

#### 5 A. The Defendant Has Waived His Right To Raise These Arguments

6 As a threshold matter, the defendant has waived his right to raise the new arguments in  
7 this motion. The defendant failed to raise many of these issues (in particular, his request to  
8 redact the indictment and the grand jury transcript) by the originally set motion deadline in  
9 January 2009. Defendant's failure to do so waived his right to raise these issues now pursuant to  
10 Fed.R.Crim.P. 12(e), which states that "[a] party waives any Rule 12(b)(3) defense, objection, or  
11 request not raised by the deadline the court sets under Rule 12(c) or by any extension the court  
12 provides." The motion should be denied on this ground.

#### 13 B. The Documents Are Admissible For The Non-Hearsay Purpose Of Proving 14 Materiality

15 All of the charged counts in this case require the government to prove that the defendant's  
16 false statements were material. Counts One through Ten of the indictment allege that the  
17 defendant made false declarations to the grand jury, in violation of 18 U.S.C. § 1623(a). In order  
18 to gain a conviction with respect to these counts, the government is required to prove beyond a  
19 reasonable doubt that: (1) the defendant testified under oath before a grand jury; (2) the testimony  
20 was false; (3) the testimony was material to the grand jury before which he testified; and (4) the  
21 defendant knew that the testimony was false and material to the matters before the grand jury.  
22 *United States v. Thomas*, 612 F.3d 1107, 1114 (9th Cir. 2010); *United States v. McKenna*, 327  
23 F.3d 830,838 (9th Cir. 2003). The obstruction of justice count alleged in Count Eleven, in  
24 violation of 18 U.S.C. § 1503(a), similarly requires the government to demonstrate beyond a  
25 reasonable doubt that the defendant: (1) corruptly (2) obstructed, influenced, or impeded, or  
26 endeavored to influence, obstruct, or impede through his statements (3) the grand jury proceeding  
27 in which defendant testified; (4) the statement was material to the grand jury before which the  
28 defendant testified; and (5) the defendant knew the statement was material to the grand jury  
before which he testified. *Thomas*, 612 F.3d at 1128-1131.

1 In the context of a perjury prosecution, the Ninth Circuit has held that a “statement is  
2 material if it has a natural tendency to influence, or was capable of influencing, the decision of  
3 the decision-making body to which it was addressed. To be material a false statement need only  
4 be relevant to any subsidiary issue under consideration.” *McKenna*, 327 F.3d at 838; *see United*  
5 *States v. Gaudin*, 515 U.S. 506, 509 (1995). In *McKenna*, the Ninth Circuit observed that courts  
6 allow the prosecution to prove materiality by introducing the complete transcript of the prior  
7 proceeding; by presenting testimony from persons who witnessed those proceedings; by  
8 presenting testimony from a member of the grand jury or jury; or through witness summaries  
9 from the prior proceedings. 327 F.3d at 843.

10 The perjury counts in this case concern Bonds’s false responses to four broad categories  
11 of questions: (1) whether Bonds knowingly took, or obtained, steroids (Counts One, Two, and  
12 Three); (2) whether Bonds was ever injected by a person other than a doctor (Count Four); (3)  
13 whether Bonds took, or obtained, human growth hormone (Count Five); and (4) the timing of  
14 when Bonds took the items given to him by Greg Anderson (Counts Six through Ten). The  
15 questions were posed to Bonds in the context of a grand jury investigation into the illegal drug-  
16 trafficking conduct of Victor Conte, Greg Anderson, and others associated with Balco.  
17 Accordingly, in order to show materiality, the government must show that Bonds’s false  
18 statements were capable of influencing the Balco grand jury in its investigation and evaluation of  
19 the evidence pertaining to Conte, Anderson, and others involved in the Balco investigation. In  
20 addition, the obstruction of justice count (Count Eleven) alleges that Bonds obstructed justice by  
21 providing intentionally evasive, false, or misleading statements to the Balco grand jury. As to  
22 this count, the government is similarly required to demonstrate that the particular evasive, false,  
23 or misleading statements identified in the government’s jury instructions were capable of  
24 influencing the investigation and evaluation of evidence by the Balco grand jury.<sup>1</sup>

25 The excluded documents constitute important, substantial proof of materiality in this

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26  
27 <sup>1</sup>At page 3 of the defense motion, Bonds inaccurately asserts that the obstruction of  
28 justice count is “based on the ten alleged false statements.” In fact, the obstruction of justice  
count rests upon the ten false statements and the series of evasive and misleading statements  
identified in the government’s October 15, 2010 jury instructions.

1 case. One of the key reasons for calling Bonds into the Balco grand jury was to ask him  
2 questions about the excluded documents. It is for this reason that so much of the grand jury  
3 transcript is concerned with the documents. The government was questioning Bonds about his  
4 apparent knowledge of the illegal steroid distribution activities of the Balco defendants. See,  
5 12/4/03 Bonds Grand Jury Transcript, attached to the defense filing as Exhibit C (hereafter,  
6 “Bonds TX”). The reason Bonds’s false statements in response to those questions mattered to  
7 the Balco grand jury was that his false statements were completely inconsistent with voluminous  
8 documents reflecting the role of the Balco defendants in distributing drugs to Bonds and  
9 monitoring his use of those drugs. Precluding the government from showing these documents to  
10 the jury, or at least referencing them in witness testimony, effectively strips Bonds’s false  
11 statements of necessary context and requires the government to present them in a vacuum. The  
12 effect of such an order will unfairly tie the government’s hands in proving the required element  
13 of materiality.

14 Additionally, the government must prove that the defendant knew that his false  
15 statements were material to the grand jury. The mere fact that the defendant was confronted with  
16 the documents listed below was a clear message to the defendant that the grand jury investigation  
17 into Balco was thorough and serious, and that his testimony was important. If the trial jury is  
18 precluded from learning about the documents shown to the defendant during his testimony, there  
19 is a risk that it will be susceptible to false arguments by the defense claiming unfair treatment of  
20 the defendant during his questioning. The documents, and the questions about them – along with  
21 the defendant’s answers – are critical to proving the defendant’s knowledge of the materiality of  
22 his answers, the fairness of the questioning of the defendant, and the context of the testimony in  
23 terms of the overall investigation.

24 The defense does not seriously contest the relevance of these items to materiality, but  
25 instead seeks to minimize the government’s burden of proving materiality as a pretext for  
26 keeping this evidence out. Indeed, the defense appears to suggest that the government has  
27 established the materiality of all of the charged false, evasive, and misleading statements alleged  
28 in the indictment by simply telling Bonds in the grand jury that the grand jury was investigating

1 Conte and Anderson for the illegal distribution of drugs. Defense Motion, p. 6. This argument  
2 glosses over that the government is required to prove this element beyond a reasonable doubt, as  
3 with every element of the alleged crimes. The government should be permitted to provide a  
4 coherent context for the trial jury to consider the materiality of the false statements in this case  
5 through the limited use of the documents that were the underpinning of the investigation.

6 The provisionally excluded documents represent the best proof of materiality, as they  
7 provided the impetus for putting Bonds in the grand jury in the first place. While the government  
8 has other evidence of materiality, in the form of Bonds's responses to other questions in the  
9 grand jury transcript, agent testimony, and the guilty pleas of Anderson and Conte, none of these  
10 alternative means demonstrate materiality with the clarity and directness of the documents  
11 themselves. By introducing the documents, as described below, the government can show  
12 precisely why each question alleged in the indictment, and each false and evasive statement  
13 which constitutes an act of obstruction, was capable of influencing the grand jury's investigation.  
14 The documents thus constitute the best possible proof of materiality, in that they can be matched  
15 to the specific false, evasive, and misleading statements alleged in the indictment. The  
16 government's other proof of tends to show that Bonds's testimony, as a whole, was capable of  
17 influencing the grand jury, but it is only through the documents that the government can  
18 demonstrate the materiality of each individual question.

19 The government understands and respects the Court's ruling barring the use of these  
20 documents for the purpose of proving the truth of the information contained in the documents. In  
21 order to prevent the improper use of the documents referenced in the defense papers, the  
22 government proposes redacting these documents to remove the references to actual positive test  
23 results, in order to address the defense concern of the trial jury considering the inadmissible  
24 hearsay contained within the documents. In addition, the government would stipulate to a jury  
25 instruction that would inform the jury that they cannot consider the documents for any purpose  
26 other than materiality and to explain the background and context of the government's  
27 investigation.

28 While all of the documents are important, the government further requests the Court

1 particularly consider admitting redacted copies of four particular sets of documents (attached to  
 2 this motion and identified, for purposes of this motion, as Exhibits 1-4): (1) pertinent pages from  
 3 the Balco ledger in which Bonds's name is referenced; (2) Quest Diagnostics test results  
 4 corresponding to the ledger entries for Bonds; (3) handwritten notes captioned "Barry" found at  
 5 Anderson's residence; and (4) calendars found at Anderson's residence bearing Bonds's initials.  
 6 The government submits that admitting redacted copies of these documents is important to the  
 7 government's proof of materiality in this case. An order authorizing the admission of copies of  
 8 these documents for the non-hearsay purposes of materiality and case background with  
 9 appropriate redactions and limiting instructions would comply with the Court's prior order  
 10 without causing undue prejudice to the defendant.

11 To facilitate the Court's consideration of this question, the government has broken down  
 12 the exhibits into categories, with an accompanying discussion of the manner in which the  
 13 particular documents provide essential proof of materiality.

14 **1. Test Result Documents.**

15 Items found at Balco and Anderson's residence

- 16 Exhibit 2 Correspondence pertaining to Bonds's test results  
 17 Exhibit 3 BLB Quest Documents  
 18 Exhibit 6 Specialty Lab and Fed Ex Documents  
 19 Exhibit 7 B, B Specialty Lab Documents  
 20 Exhibit 8 Balco Blood Test Ledger Books  
 21 Exhibit 9 Balco BLB Blood Tests  
 22 Exhibit 10 LabOne Blood Test Fed Ex documents  
 23 Exhibit 13 LabOne Tests  
 24 Exhibit 33 BB/Bonds Tests from Quest and LabOne  
 25 Exhibit 38 "Greg Anderson 25" File-Lab One/Quest Documents with Bonds' DOB

26 Items obtained from blood and urine testing laboratories

- 27 Exhibits 45-54 Quest test results for Bonds and others  
 28 Exhibit 59 LabOne Blood Tests for Barry Bonds

## 1 Exhibit 60 Specialty Lab Tests for Bonds

2 These documents demonstrate the materiality of Bonds's false statements as to Counts  
3 One, Two, and Three. These three counts all allege that Bonds falsely denied that he had  
4 knowingly taken steroids. In Count One, Bonds was asked whether he ever took steroids given  
5 to him by Anderson, and Bonds responded, "Not that I know of." In Counts Two and Three,  
6 Bonds denied taking testosterone (Count Two) and steroids (Count Three) during particular  
7 periods of time associated with the calendars. These false statements were capable of influencing  
8 the Balco grand jury because they called into question the core of the government's proof of  
9 illegal drug trafficking by Conte and Anderson. Agents found many of these test result  
10 documents during their searches of Balco and Anderson's residence. The government was  
11 investigating Conte and Anderson for drug trafficking. Whatever the subsequent hearsay  
12 problems created by Anderson's conduct, the probative value of these documents as to the drug  
13 trafficking case against the Balco defendants is undeniable; the documents are a catalog of illegal  
14 doping and concealed drug testing.

15 The seizure of the test documents from the Balco premises and Anderson's residence  
16 linked Bonds to Balco and Anderson, and plainly implicated Bonds as someone with knowledge  
17 of the drug trafficking activities of Conte, Anderson, and the other Balco defendants. The  
18 government subsequently obtained additional documentation from the labs themselves (Exhibits  
19 45-54, 59, and 60), and these documents matched up with the documents obtained from Balco  
20 and confirmed that Balco had requested steroid panels on some of the specimens linked to  
21 Bonds, among other tests.

22 Bonds was asked a number of questions about whether he ever knowingly took steroids  
23 provided to him by Anderson (Counts One, Two and Three) and also whether he knew about  
24 these test results. See, Bonds TX at pp. 54, 80, 98, and 103. Bonds claimed that he never  
25 knowingly took steroids, and that he had no knowledge that he was being tested for steroids.  
26 Bonds's knowledge of the nature of the substances he was obtaining from Balco and Anderson  
27 was plainly material to the grand jury's consideration of whether Conte and Anderson had, in  
28 fact, engaged in illegal conduct, because the government was attempting to develop evidence of

1 illegal drug distribution. If an athlete admitted that he knew he was illegally receiving anabolic  
2 steroids and human growth hormone from Conte and Anderson (as most athletes did in the Balco  
3 grand jury), such testimony was probative and helpful to the government's case in that it  
4 corroborated the veracity of the documents, particularly if the athlete stated that Conte and  
5 Anderson had told them the drugs were illegal and explained how to administer and conceal  
6 them. Conversely, Bonds's false denials of knowing steroid receipt and use of the drugs  
7 provided by the Balco defendants cast doubt on the credibility of the calendars and other  
8 documents tending to demonstrate the distribution of steroids. In addition, Bonds's claims of  
9 ignorance that his blood and urine were being tested for steroids was material to the grand jury's  
10 evaluation of whether Conte and Anderson were simply drug distributors, or something more,  
11 i.e., individuals engaged in doping unknowing athletes. The test results raised the inference that  
12 Bonds was a knowing recipient of steroids who was knowingly having his blood and urine tested  
13 as part of his regimen of steroids use and receipt; Bonds denied that he was knowingly  
14 participating in such a scheme. The test result evidence accordingly plays an important role in the  
15 government's proof that Bonds's false statements before the grand jury regarding his knowing  
16 receipt and use of anabolic steroids from Anderson and Conte had the ability to influence the  
17 grand jury's decision in evaluating the case against those individuals.

18 In sum, the government should be permitted to offer the above-referenced test result  
19 documents not for the truth of the information asserted within them, but to prove the ways in  
20 which Bonds's testimony could have materially affected the grand jury, particularly as that  
21 testimony contradicted the test results. The government would stipulate to a jury instruction  
22 informing the jury that they cannot consider the test result evidence for any purpose other than  
23 materiality and to explain the background and context of the government's investigation.

## 24 **2. Bonds Calendars**

25 Exhibit 13 BLB calendars

26 Exhibit 33 BB calendars

27 As with the urine test results, the calendars are admissible in this case for the non-hearsay  
28 purpose of establishing the materiality of the false statements Bonds made to the grand jury. As

1 a part of the government's investigation of Anderson and Conte, Bonds was repeatedly asked  
2 questions about the calendars in the grand jury. See, Bonds TX at 80, 97, 98, 110, and 123.  
3 Counts Two and Three reference Bonds's steroid use during particular periods of time based on  
4 the calendars. Counts Six through Ten concern Bonds's false statements regarding the period of  
5 time during which he was using steroids based on the calendars. In his grand jury testimony,  
6 Bonds consistently denied knowledge of the calendars and the information contained with them.  
7 Bonds TX at 80, 97, 98, 110, and 123. The calendars suggested Bonds's knowing receipt of  
8 anabolic steroids, a premise that Bonds denied repeatedly in the grand jury, thus presenting a  
9 conflict between the documentary evidence and Bonds's statements. The grand jury, of course,  
10 was evaluating the state of the evidence against Anderson and Conte. The calendars should thus  
11 be admitted for the non-hearsay purpose of demonstrating how Bonds's statements could have  
12 affected the grand jury's evaluation of the calendars as it reviewed the evidence against Anderson  
13 and Conte.

14 The calendars provide probative evidence of the materiality of Bonds's false and evasive  
15 statements in four different ways.

16 First, as with the test results, the calendars raised direct questions regarding Bonds's  
17 knowledge of the nature of the substances that he was obtaining from Anderson. As noted  
18 previously, Bonds's knowledge of what he was receiving from Conte and Anderson was material  
19 to the grand jury's investigation into illegal steroid and human growth hormone distribution by  
20 Conte and Anderson, and in particular what Conte and Anderson were telling the recipients about  
21 the drugs. Conte and Anderson could have been liable for different criminal conduct if they had  
22 dosed unknowing recipients with these drugs. Bonds's testimony was inconsistent with the  
23 calendars and raised questions about whether there was a credibility issue with Bonds or the  
24 calendars themselves. The calendars thus demonstrate the materiality of Bonds's responses to  
25 Counts One, Two, and Three, in which Bonds denied knowingly receiving steroids from Conte  
26 and Anderson.

27 Second, some of the drugs referenced in the calendars were injectable, including some of  
28 the steroids and human growth hormone. Counts One, Two, and Three concern anabolic

1 steroids, which are often injected; Count Four concerns Bonds's false statement that he had not  
2 been injected by anyone other than his doctor; and Count Five concerns Bonds's false statement  
3 about human growth hormone, a substance that (as the government will show at trial) can only  
4 effectively be administered through an injection. Again, Bonds's testimony that he was never  
5 injected by anyone except a doctor conflicted with the evidence found in the calendars.  
6 Introducing the calendars is an important and substantial part of explaining to the trial jury why  
7 Bonds's false denial of being injected was material to the grand jury's evaluation of the evidence.

8 Third, Counts Six through Ten of the indictment concern Bonds's false statements  
9 regarding the timing of his use of the drugs Anderson gave him. In his false statements, Bonds  
10 went to great lengths to place his use of drugs provided by Anderson after 2001. The calendars  
11 plainly reflect that Bonds's use of the drugs commenced prior to that date, during the period of  
12 time when Bonds's athletic performance was at its record-breaking peak. The calendars are  
13 important to explaining the reasoning behind these questions, and the materiality of Bonds's false  
14 answers on these topics; indeed, without the calendars, these false statements will be difficult for  
15 the trial jury to understand, because the questions themselves reference the documents. They  
16 should be admitted, with a limiting instruction advising the jury that they may only be considered  
17 for materiality and to provide background and context.

18 Fourth, the calendars should come in because the government's evidence will prove that  
19 Bonds knew about the calendars prior to his grand jury testimony. Government witness Stan  
20 Conte will testify that Bonds told Conte that Anderson put Bonds's initials on calendars to  
21 protect other athletes. The government intends to elicit Bonds's prior admissions regarding the  
22 calendars as part of its proof of Bonds's intent to obstruct justice through his contrary, and false,  
23 statements in the grand jury that he had no knowledge of the calendars. These statements are  
24 plainly admissible, relevant, non-hearsay, and support the admission of the calendars themselves  
25 to demonstrate the materiality of Bonds's false, evasive and misleading statements with respect  
26 to the calendars.

27 **3. Ledger Sheets, Handwritten Notes and Other Items**

28 Exhibit 1 Balco Ledger Sheet

1 Exhibit 11 BLB Nutritional Program

2 Exhibit 14 Brown Portfolio

3 Exhibit 29 Handwritten note

4 Exhibit 32 BLB Handwritten notes

5 The Balco ledger sheets and above-referenced notes should also be admitted to establish  
6 materiality. The Balco ledger sheets are important to establishing the materiality of Counts One,  
7 Two, and Three. Anderson and Conte were primary targets of the investigation. These  
8 documents demonstrate that Bonds had a relationship with Balco and Anderson in which Bonds  
9 received drugs from Balco and Anderson, and was tested in connection with his use of them.  
10 Bonds's claims that he did not knowingly take steroids, as outlined in Counts One, Two, and  
11 Three, were material to the Balco grand jury in large part because they were considering  
12 documentary evidence that clearly established that Conte, Anderson, and others were distributing  
13 these drugs to willing athlete participants in the program. Bonds's testimony, if taken at face  
14 value, called into question those documents and raised the question of whether the Balco  
15 defendants were engaged in doping unwitting athletes. The ledger sheets also contradict  
16 Bonds's statements regarding the timing of his receipt of items from Balco, thus demonstrating  
17 the materiality as to Bonds's false statements in Counts Six through Ten, in which he claims that  
18 his receipt of items from Balco post-dated 2001. The government should be permitted to offer  
19 the Balco ledger sheets for the non-hearsay purpose of explaining how Bonds's false statements  
20 about the timing and nature of the items he received from Anderson could have influenced a  
21 grand jury that was reviewing such evidence as a part of its decision-making process.

22 The additional notes and materials establish that Bonds had a relationship with Balco and  
23 Anderson, and ought to be admitted to demonstrate the materiality of Bonds's false statements in  
24 Counts One, Two, and Three that he never knowingly took steroids from Balco. As explained  
25 above, Bonds's claims that he never knowingly took steroids were capable of influencing the  
26 Balco grand jury because documentation found by the government showed that Bonds had a far  
27 more detailed and developed relationship with Balco. Documents tending to reflect a  
28 relationship between Bonds and the drug activities of the Balco co-conspirators should

1 accordingly be admissible for the limited purpose of proving materiality.

2 **4. Photo Log Sheets**

3 Exhibit 62 Photos of documents at Balco, including handwritten logs

4 Exhibit 64 Photo Athlete Folders from Closet–Anderson Residence

5 Exhibit 65 Photos of drawer with Bonds notes and drugs

6 Exhibit 67 Photo–Safe with money and note at Anderson’s residence

7 Exhibit 70 Photo of brown portfolio found in Anderson’s car

8 The defense argues that photographs from the government’s searches of the Balco  
9 premises and Anderson’s residence should be excluded. This request should be rejected. The  
10 photographs of collections of documents are not hearsay. They do not depend on Anderson for  
11 their admissibility, and they do not fall within the scope of the Court’s February 2009 order.  
12 They constitute relevant, probative evidence of the underlying investigation that led to Bonds  
13 being called to the grand jury, and explains to the trial jury why Bonds’s testimony was important  
14 to the grand jury, why he was asked about documents, and why his false statements are material.  
15 The purpose of offering these photos is to corroborate the testimony of Agent Novitzky and other  
16 agents that probative documents were found at Balco, not as a back-door substitute for the  
17 documents themselves.

18 The defense apparently thinks that their good fortune in Anderson’s refusal to testify  
19 works as a magic talisman that precludes any reference to the fact that agents found documents  
20 during the searches. The Court’s hearsay ruling did not extinguish the validity of the lawful  
21 searches of Balco and Anderson’s residence, and the government should be permitted to  
22 summarize the results of those searches and the relationship between those searches and the  
23 decision to have Bonds testify. A necessary part of that explanation will include testimony and  
24 photos of the searches. The government should be permitted to call agents to testify that they  
25 found documents that led to the decision to call Bonds and other athletes before the grand jury.  
26 The above-referenced photos should accordingly be admitted.

27 **5. The Envelope with the Cash**

28 Exhibit 28–Envelope with Cash Found at Anderson’s residence

1 The defendant's request to exclude Exhibit 28, an envelope stuffed with approximately  
2 \$63,000 in cash, is also without merit. The defense motion provides no explanation as to how  
3 this exhibit constitutes hearsay. It does not; it is relevant, probative evidence tending to establish  
4 that Anderson was hoarding cash proceeds garnered from drug trafficking, and thus relevant to  
5 the proof in this case by tending to establish that Bonds's statements that he never received  
6 steroids from Anderson are false. Evidence that shows Anderson was, in fact, a steroid dealer is  
7 a relevant fact in a case in which the defendant is accused of falsely stating that he never received  
8 steroids from Anderson. Evidence that a steroid dealer with links to Bonds maintained a large  
9 amount of cash stuffed in an envelope tends to suggest that Anderson was involved in illegal  
10 activity, a fact which tends to suggest that Bonds testified falsely when he claimed he never  
11 obtained illegal drugs from Anderson. Furthermore, the government's evidence will include  
12 testimony from Stan Conte that Bonds asked Anderson to hold the cash, and that the cash was for  
13 Bonds's mistresses. The cash thus assists in proving the depth of the relationship between Bonds  
14 and Anderson, and underscores the amount of trust between the two men. The defense has not  
15 offered a coherent reason to exclude this item. It should be deemed admissible and the defense  
16 motion should be rejected.

17 **6. Documents and Testimony Associated with Other Athletes**

- 18 Exhibit 4 Correspondence re: testing for Larry Izzo  
19 Exhibit 5 Other Athlete Quest Documents  
20 Exhibit 12 Other Athlete Balco and Specialty Blood Tests  
21 Exhibit 15 B. Santiago invoice  
22 Exhibit 16 A. Rios Fed Ex Receipts  
23 Exhibit 17 Estalella calendars  
24 Exhibit 18 Izzo calendars  
25 Exhibit 19 Jason Giambi calendars  
26 Exhibit 20 Jeremy Giambi calendars  
27 Exhibit 21 Misc. Notes re: Other Athletes  
28 Exhibit 31 Handwritten Notes and Fed Ex Receipts for Other athletes

- 1 Exhibit 34 Rios calendars  
2 Exhibit 37 Velarde calendars  
3 Exhibit 39 Estalella calendars  
4 Exhibit 40 Santiago calendars  
5 Exhibit 41 Giambi document and Fed Ex receipt

6 The defense argues that documentation regarding Anderson's drug distribution activities  
7 with other athletes is immaterial, and then purports to rely on the court's ruling to preclude any of  
8 the athletes from testifying as to any topic. Neither of these positions is consistent with the  
9 court's order, and both should be rejected.

10 As to the first point, the calendars for the other athletes were excluded in the Court's prior  
11 order. The government herein requests that they nonetheless be admitted to establish the  
12 materiality of Bonds's false denials of knowingly using steroids. The other players' calendars are  
13 an important piece of the proof of the materiality of Bonds's false statements because they show  
14 how Bonds's false statements regarding the nature, timing, and usage of the drugs he received  
15 from Anderson were completely inconsistent with Anderson's practice of giving athletes  
16 calendars to help them know when to self-administer steroids and other drugs. Bonds's false  
17 statements regarding his own steroid use, as reflected in calendars, were capable of influencing  
18 the Balco grand jury because they called into question not only the Bonds calendars, but the  
19 calendars and testimony of other athletes who acknowledged that they had knowingly received  
20 steroids from Anderson. The calendars of other athletes provide necessary context for the  
21 questions posed to Bonds about his own calendars. They should be admitted, subject to  
22 appropriate redactions and a limiting instruction.

23 The defense also seeks to expand the Court's prior order through a new order that would  
24 exclude all athlete testimony from witnesses Marvin Benard, Jason Giambi, Jeremy Giambi,  
25 Larry Izzo, Armando Rios, Benito Santiago, and Randy Velarde (collectively, "the athlete  
26 witnesses"). The defense appears to argue that the athlete testimony lacks relevance because the  
27 athletes have nothing probative to say the case if the calendars are excluded. This is inaccurate.  
28 The athlete witnesses will testify about receiving drugs from Greg Anderson, about instructions

1 Anderson provided regarding the proper use and administration of the drugs, and what Anderson  
2 told the athletes about the efficacy of the drugs. Several of these athlete witnesses will testify  
3 that they knew that Anderson and Balco were testing their blood and urine to monitor the results  
4 of their steroid use. This testimony constitutes relevant, admissible evidence in that it has a  
5 tendency to prove the material fact of Bonds's knowledge that he was in fact receiving steroids  
6 from Balco. It further tends to establish the relevant fact that Bonds's relationship with Balco  
7 was, by inference, one that involved the receipt of steroids and the testing of his blood and urine,  
8 as he admitted in his grand jury transcript. This testimony also serves to corroborate the  
9 testimony of several government witnesses, including Steve Hoskins and Kimberly Bell.  
10 Hoskins and Bell will both testify that Bonds told them (in separate conversations) that he was  
11 using steroids. The government should be permitted to corroborate the testimony of these  
12 witnesses through the testimony of other athletes who will testify that they received steroids from  
13 Anderson, that they understood that they received steroids from Anderson, and that they knew  
14 Anderson worked closely with Bonds in his training regimen. The testimony of the athlete  
15 witnesses should accordingly be admitted.

#### 16 **7. Other Witnesses**

17 The defense motion also seeks to extend the Court's prior ruling by arguing that the Court  
18 intended to bar any witness from making any reference to the excluded documents, apparently for  
19 any purpose. Defendant's motion, p. 16. This motion should be denied, as the government  
20 should be permitted to call witnesses to testify generally regarding their involvement with  
21 documents in the investigation so long as their testimony is for a relevant, non-hearsay purpose.  
22 These witnesses include the agents conducting the search at Balco and Anderson's residence and  
23 James Valente, the Balco vice-president.

#### 24 **a. Testimony by Agent Novitzky and other agents at search warrants**

25 Agent testimony regarding the role of the documents in the background and execution of  
26 the investigation is not hearsay. Hearsay is an out-of-court statement offered to prove the truth of  
27 the matter asserted. See Fed.R.Ev. 801(c). Testimony not offered to prove the truth of an out-of-  
28 court statement, but offered instead for relevant context or background, such as explaining how

1 an investigation or undercover operation developed, is not considered hearsay. *United States v.*  
2 *Echeverry*, 759 F.2d 1451, 1456-57 (9<sup>th</sup> Cir. 1985); *United States v. Gibson*, 690 F.2d 697, 700-  
3 02 (9<sup>th</sup> Cir. 1982). The defense overlooks that federal courts have consistently held that out of  
4 court statements that might otherwise constitute hearsay may be admitted as non-hearsay if they  
5 are relevant to explain the course of the agents' subsequent investigative actions, and the  
6 probative value of the evidence's non-hearsay purpose is not substantially outweighed by the  
7 danger of unfair prejudice caused by the impermissible hearsay use of the statement. *See Ryan v.*  
8 *Miller*, 303 F.3d 231, 252-53 (2d Cir. 2002); *see also United States v. Valencia*, 957 F.2d 1189,  
9 1198 (5th Cir. 1992); *United States v. Hawkins*, 905 F.2d 1489, 1495 (11th Cir. 1990); *United*  
10 *States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *United States v. Lubrano*, 529 F.2d 633, 637  
11 (2d Cir. 1975).

12 In this case, government agents should be permitted to testify regarding their seizure of  
13 these documents at Balco and at Anderson's residence to explain the background of their  
14 investigation, and the subsequent investigative steps taken after finding the documents, including  
15 the decision to subpoena Bonds to testify in the grand jury. Such testimony is relevant, non-  
16 hearsay evidence of the government's investigation in this case which explains the background of  
17 the investigation, provides logical context for the government's decision to issue a grand jury  
18 subpoena to Bonds, and explains the nature of the questions posed to Bonds in the grand jury.  
19 The agents should be permitted to testify, in general terms, that they found documents that bore  
20 Bonds's initials and appeared to be calendars containing drug notations that linked Bonds to the  
21 drug trafficking activities of Balco and Anderson. This testimony is not offered for the truth of  
22 the matter asserted, but rather to explain the agents' subsequent investigation and provide the  
23 trial jury with context for Bonds's grand jury appearance. Furthermore, as noted previously,  
24 these exhibits can be redacted to remove specific references to steroids and still preserve their  
25 non-hearsay value, namely, showing the connections between Bonds, Balco and Anderson,  
26 explaining the decision to subpoena Bonds, and explaining the background and context of the  
27 investigation. Such redaction should allay the defendant's hearsay concerns.

28 Moreover, any claim that the probative value of such testimony is "substantially

1 outweighed” by the prejudice of introducing the documents to the trial jury is without merit. The  
2 government does not intend to have the agents testify about the substance of what was written on  
3 the calendars or other documents. The government simply proposes having the agents testify that  
4 they found pertinent documents suggesting Bonds’s involvement with Balco and Anderson, and  
5 that this discovery led them to take further investigative steps. Given that the government is  
6 going to call witnesses who will provide testimony of their firsthand knowledge of Bonds’s  
7 receipt of injections, his admissions of steroid use, and his interest in steroid use, it is not unfairly  
8 prejudicial for a government agent to testify in a limited fashion that he found documents linking  
9 Bonds to the steroid distributors at Balco, particularly when other exhibits prove beyond any  
10 doubt that Bonds had a close relationship with Conte and Anderson, and Bonds admitted his  
11 close relationship with Anderson before the grand jury. Accordingly, the government should be  
12 permitted to have an agent generally summarize and describe both the documents and their role  
13 in the government’s investigation.

14 **b. James Valente**

15 For the same reasons, the government should be permitted to call James Valente.  
16 Valente, Balco’s vice president and director of operations, will testify that he created a ledger in  
17 which he entered athlete urine specimens which were assigned donor numbers and referred for  
18 testing to Quest Diagnostics, a national drug testing laboratory. Valente will also testify that he  
19 personally observed Bonds at Balco on three occasions. On one of those occasions, Anderson  
20 brought Bonds in to Balco to meet with Victor Conte. Among the topics discussed at the  
21 meeting was the blood and urine testing services provided by Balco. On another occasion, Bonds  
22 came in for a blood draw performed by Bonds’s doctor, Dr. Arthur Ting. On a third occasion,  
23 Bonds came in for a photo shoot and a magazine interview. These topics are plainly relevant,  
24 non-hearsay subjects that Valente should be permitted to describe in his testimony.

25 In conjunction with these firsthand contacts with Bonds, Valente should be permitted to  
26 generally testify that he knew Anderson as a person who provided blood and urine samples for a  
27 number of athletes, and that Anderson had a close relationship with Bonds and counted Bonds as  
28 one of his clients. Valente should further be permitted to testify that he received blood and urine

1 samples from Anderson for Anderson's clients, and that he was personally involved in sending  
2 those samples out for steroid testing and maintaining paperwork associated with the testing of  
3 those athletes' samples. This testimony is relevant, non-hearsay evidence which involves no  
4 more than Valente describing his job responsibilities at Balco.

5 **8. The Proposed Redactions To The Indictment And The Grand Jury Transcript**

6 The defendant's final two requests, to edit the indictment and the grand jury transcript,  
7 should be denied. The defendant appears to argue that, because the documents have been  
8 excluded on hearsay grounds, they must be suppressed and there be no mention of them at trial.  
9 The defense provides no case law or legal analysis to support this premise.

10 **a. The Indictment**

11 The perjury counts in the charging instrument in this case, the second superseding  
12 indictment, include passages from the grand jury transcript which frame, and provide context for,  
13 the false statement at the heart of each count. The defense asks the Court to redact portions of  
14 this framing language from Count Two and Count Nine of the indictment. The request should be  
15 denied for four reasons. First, the inclusion of the reference to the calendars in Counts Two and  
16 Count Nine accurately and properly references the grand jury transcript, and aids the reader of the  
17 indictment in understanding the context of the charged conduct. Second, there was nothing  
18 improper about including this information in the indictment; the fact that these calendars may not  
19 be admitted at trial does not make it improper for the government to have referenced them in the  
20 indictment. Third, the hearsay rules do not apply to the language of an indictment. There is  
21 therefore no basis to redact the indictment based upon the Court's prior ruling, which was an  
22 evidentiary ruling based on hearsay and a lack of proper foundation, not an exclusionary ruling.  
23 Fourth, as the government understands that the Court does not typically provide a copy of the  
24 indictment to the jury, a redaction of the indictment seems immaterial. For all of these reasons,  
25 the indictment should remain intact and unredacted.

26 **b. The Grand Jury Transcript**

27 The government opposes the defendant's motion to redact over one-fourth of the grand  
28 jury transcript in this case. The defense request, which is styled as a request to "conform" the

1 transcript to the Court's prior order, would transform Bonds's testimony from a logical series of  
2 questions and answers into a heavily-edited transcript that leaps from one topic to the next with  
3 little coherence and no explanation for its lack of organization. The defense should not be  
4 permitted to take the original evidence of Bonds's criminal conduct in this case and modify it to  
5 the point that it is incomprehensible. The fairest way to handle this transcript is to publish the  
6 entire transcript to the jury. The government further requests that the transcript be provided to  
7 the jury during its deliberations.

8 The law suggesting that the entire transcript should be admitted is animated by a concern  
9 with fairness to both the government and the defense. In *United States v. Ronda*, 455 F.3d 1273,  
10 1294 11<sup>th</sup> Cir. 2006), the Eleventh Circuit held that in perjury cases, district courts should view a  
11 witness's testimony as a whole and his statements should not be taken out of context. See *Van*  
12 *Liew v. United States*, 321 F.2d 674, 678 (5th Cir.1963) ("A charge of perjury may not be  
13 sustained by the device of lifting a statement of the accused out of its immediate context and thus  
14 giving it a meaning wholly different than that which its context clearly shows.") (quotation marks  
15 and citation omitted). Similarly, the Ninth Circuit has noted that courts allow the prosecution to  
16 prove materiality by introducing the complete transcript of the prior proceeding; by presenting  
17 testimony from persons who witnessed those proceedings; by presenting testimony from a  
18 member of the grand jury or jury; or through witness summaries from the prior proceedings.  
19 *United States v. McKenna*, 327 F.3d 830, 843 (9th Cir. 2003); *United States v. Leon-Reyes*, 177  
20 F.3d 816, 820 (9th Cir. 1999).

21 Furthermore, it is the government's burden to establish a nexus between the grand jury's  
22 investigation and the defendant's false statements. The Seventh Circuit has held that one way of  
23 proving this nexus is to introduce the transcript of the grand jury proceedings in which the  
24 defendant provided the false statements. *United States v. McComb*, 744 F.2d 555, 563 (7<sup>th</sup> Cir.  
25 1984); *United States v. Picketts*, 655 F.2d 837 (7<sup>th</sup> Cir. 1981).

26 The Eleventh Circuit has expressly held that a grand jury transcript may be properly  
27 presented to the jury during its deliberations on a perjury charge. In *United States v. Saget*, 991  
28 F.2d 702, 711 (11<sup>th</sup> Cir. 1993), the court upheld a district court's decision to permit a grand jury

1 transcript to be provided to the jury during deliberations in a case involving perjury, stating:

2           Since Hall [the defendant] was charged with making  
3           false declarations before the grand jury, the transcripts  
4           of the grand jury proceeding were directly relevant to  
5           the government's case. Where transcripts of grand jury  
6           testimony are offered to support a charge of perjury,  
7           the transcripts constitute substantive evidence of the charge  
8           and may be reviewed by the jury during its deliberations.  
9           The district court properly allowed the transcript to be  
10          considered by the jury during deliberations.

11 991 F.2d at 711.

12           *Saget* applies here. Bonds is charged with making false declarations before a grand jury.  
13 In addition, the defendant is also charged with evasive and misleading conduct for the purpose of  
14 obstructing justice pursuant to 18 U.S.C. § 1503. The totality of the transcript is needed to  
15 provide context for the numerous occasions beyond the expressly charged false statements in  
16 which the defendant provided evasive, false, or misleading testimony.

17           In a 2008 perjury trial with very similar legal issues, *United States v. Thomas*, CR 06-  
18 0803 SI, this Court admitted the entire grand jury transcript to provide the trial jury with a  
19 complete context for the false statements and obstruction of justice alleged in the indictment.  
20 The government respectfully requests that the Court enter an identical order here, as the same  
21 rationale applies. The grand jury returned ten false declaration charges and an obstruction of  
22 justice charge and the government's proof relies upon the context of the entire grand jury  
23 transcript.

24           Bonds's request for redaction is premised upon the argument that because the calendars  
25 were excluded for a lack of foundation, all references to the calendars must therefore be excluded  
26 from the grand jury transcript. This premise is legally baseless. First, the documents were  
27 properly used to question Bonds about the conduct of Anderson and Conte; the documents had  
28 been found at Balco and Anderson's residence, and contained clear evidence of drug trafficking  
activity by the Balco co-conspirators. Second, to the extent the defense cites the hearsay  
problems with the documents, the Federal Rules of Evidence do not apply to grand jury  
proceedings, except for privileges and illegal electronic surveillance. Fed. R. Evid. 1101(d)(2).  
As those exceptions do not apply here, there was no impropriety in the government relying upon

1 the documents to question Bonds. Third, the questioning regarding the documents in the grand  
2 jury was not hearsay in any event. The prosecutor's questions about the calendars are not  
3 hearsay; the questions are not statements "for the truth of the matter asserted," but inquiries to  
4 Bonds regarding the timing of his steroid use, as reflected in the documents. Nor are Bonds's  
5 answers hearsay; he is providing answers and explanations on the topics of steroids from his  
6 firsthand experience, and his responses are admissible as admissions. Given that the use of the  
7 documents to question Bonds was completely proper, there is no reason that the entirety of the  
8 grand jury transcript should not be introduced to the trial jury as a part of the evidence in this  
9 case.

10 The context provided by the calendar references is critical to the jury's understanding of  
11 the transcript. If Bonds's argument were correct, he could make a materially false statement  
12 pertaining to a document, and if the document were inadmissible for some reason, the  
13 government in essence would be precluded from offering any evidence at all of the false  
14 testimony. The Court's prior ruling did not hold that the subject matter of the documents was  
15 off-limits based on a Fourth Amendment violation, government misconduct, or the existence of  
16 an evidentiary privilege. Rather, the Court found the documents inadmissible because of the  
17 unavailability of the witness who provided the statements contained within them. There is no  
18 legal or logical reason to exclude any other references to the documents so long as those  
19 references do not constitute hearsay. As the grand jury transcript does not constitute hearsay, the  
20 entire transcript can, and should, be admitted to provide the full context of the defendant's  
21 conduct in the grand jury.

22 Bonds argues that he will be unfairly prejudiced if the references to the documents remain  
23 in the transcript. However, the Court can easily address this concern by instructing the jury that  
24 exhibits which are legitimately used in the grand jury are sometimes not admissible at trial for  
25 various legal reasons. Such an instruction allows the government to prove its case through the  
26 presentation of a complete grand jury transcript while protecting the defendant from speculation  
27 about the missing calendars. As to any claim that jury instructions cannot cure this issue because  
28 the trial jurors will disregard them, this argument is without merit because jurors are assumed to

