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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BARRY BONDS, Defendant.	No. CR 07-0732-SI **UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO REQUIRE THE GOVERNMENT TO PROVIDE INFORMATION ABOUT THE DECISION NOT TO PROSECUTE STEVEN HOSKINS** Date: January 21, 2011 Time: 11:00 a.m. Judge: Honorable Susan Illston

I. INTRODUCTION

Defendant Barry Bonds has filed a motion requesting that this Court order the government to disclose information regarding the government's decision to decline prosecution on an investigative referral made by defendant Bonds with respect to Steve Hoskins ("the Defense Motion.") Bonds made allegations of fraud against Hoskins in 2003 after a falling out between the two men. The United States Attorney's Office for the Northern District of California ("the NDCA") recused itself from that matter in 2003, and the results of that investigation were independently evaluated by the United States Attorney's Office for the

Western District of Washington ("the WDWA"). In 2005, that office declined prosecution of the matter. See Defense Motion Exhibit A. No deals or agreements were made with Hoskins by either the NDCA or the WDWA to decline to prosecute in exchange for Hoskins' testimony in the prosecution of Barry Bonds, nor did the NDCA influence the WDWA's decision in any way, rather, the matter was evaluated by the WDWA on its merits and the decision made on same.

Bonds now seeks further information regarding the declination of the case, including internal memoranda pertaining to the declination process. Bonds claims such material falls within the rubric of *Brady v. Maryland*, 373 U.S. 83 (1963).

The government acknowledges its legal obligation to provide information pursuant to *Brady*. As part of the discovery process in the present indictment, and pursuant to the requirements of the disclosure of potential impeaching information under *Giglio v. United States*, 405 U.S. 150 (1972), the government has provided to the defense the information underlying the criminal referral by Bonds against Hoskins, that is, the FBI reports of that investigation itself.

The government declines to provide further information pertaining to the WDWA's internal evaluation of the case as there is no undisclosed information which is discoverable, under *Brady* or under any other theory. The internal memoranda and communications underlying the decision to decline the prosecution are not discoverable under the Federal Rules of Criminal Procedure.

Furthermore, since the government and Hoskins did not enter in to any agreement to decline prosecution in exchange for his testimony, Hoskins did not receive any benefit as a result of the WDWA's decision. The government accordingly respectfully requests that the Court deny the motion to require further disclose of information.

II. STATEMENT OF THE CASE

Bonds is charged with ten counts of making false declarations before the grand jury, in violation of 18 U.S.C. § 1623(a), and one count of obstruction of justice in violation of 18 U.S.C. § 1503. The case is set for trial before this Court on March 21, 2011, with a pretrial conference set for March 1, 2011.

III. STATUS OF DISCOVERY

The government has voluntarily disclosed over 48,000 pages of discovery in this case. This discovery included pertinent reports and documents in connection with the Balco case and the investigation of Bonds. The disclosed materials includes numerous investigative reports regarding the investigation as a result of Bonds's complaint to the FBI regarding Steve Hoskins. This investigation began in 2003 when Bonds met with law enforcement and claimed Hoskins, his former friend and associate, had defrauded him out of sports memorabilia and funds associated with Bonds-related sports memorabilia. In addition to the underlying factual documents of that case, the government has provided counsel with a copy of a 2005 letter from the Western District of Washington in which that office informed Hoskins' attorney that it had evaluated the referral for criminal prosecution, and had decided to decline the matter. Defense Motion Exhibit A.

III. ARGUMENT

A. The Discovery Sought In Bonds's Motion Is Specifically Exempted From Disclosure Pursuant to Fed.R.Crim.P. 16(A)(2)

Rule 16(a) of the Federal Rules of Criminal Procedure defines the materials the prosecution must produce on the defendant's request. Rule 16(a)(1)(c) addresses the discovery of documents and tangible objects. Under Rule 16(a)(1)(c), the government must permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies and portions thereof, which are within the possession, custody or control of the government, if the requested items (1) are material to the preparation of the defendant's defense; (2) are intended for use by the government as evidence in chief at the trial, or (3) were obtained from or belong to the defendant. As stated in the rule, to obtain items under the first of the three above-referenced categories, the item need not be disclosed unless the defendant demonstrates that it is material to the preparation of his defense. A general description of the item will not suffice; neither will a conclusory argument that the requested item is material to the defense. *United States v. Carrasquillo-Plaza*, 873 F.2d 10, 12-13 (1st Cir. 1989); *United*

States v. Cadet, 727 F.2d 1453, 1466 (9th Cir. 1984). The discovery afforded by Rule 16(a)(1)(c) is limited by Rules 16(a)(2) and (3). Rule 16(a)(2) expressly exempts from disclosure "reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case," and, "statements made by government witnesses or prospective government witnesses." Accordingly, to the extent Bonds's motion requests internal memoranda and documents pertaining to the decision to decline prosecution against Bonds, Rule 16(a)(2) forbids such disclosure. The defense request for such material must therefore be denied.

B. Bonds Provides No Factual Basis For Believing That The Requested Items Contain Exculpatory Material

The defense notes, correctly, that the United States' obligations regarding the production of exculpatory material are ultimately governed by the principles of *Brady v. Maryland*, 373 U.S. 83 (1963). The United States recognizes these obligations, and will fully comply with its obligations under *Brady, Giglio v. United States*, 405 U.S. 150 (1972), and *United States v. Agurs*, 427 U.S. 97 (1976), as well as its continuing duty to disclose under Rule 16(c) of the Federal Rules of Criminal Procedure. *Brady* requires the prosecutor to turn over to the defense evidence that is favorable to the accused, even though it is not subject to discovery under Rule 16(a), since, eventually, such evidence could "undermine[] the confidence in the outcome of the trial." *United States v. Bagley,* 473 U.S. 667, 678 (1985).

The defendant's right to the disclosure of favorable evidence, however, does not "create a broad, constitutionally required right of discovery." *Bagley*, 473 U.S. at 675 n.7. Indeed, a "defendant's right to discover exculpatory evidence does not include the unsupervised right to search through the [government's] files,' *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987), nor does the right require the prosecution to deliver its entire file to the defense. See *Agurs*, 427 U.S. at 109. Rather, *Brady* obligates the government to disclose only favorable evidence that is "material." The "touchstone of materiality is a 'reasonable probability' of a different result." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Accordingly, under *Brady*, the government need

only disclose evidence during pretrial discovery (or later, at trial) evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings.

The Supreme Court explained the meaning of "material" in the context of the *Brady* rule in *United States v. Agurs*, 427 U.S. 97 (1976). In *Agurs,* the defendant was on trial for a stabbing murder. The evidence at trial established that the victim possessed two knives just before he was stabbed to death with one of them. After trial, defense counsel learned that the victim's undisclosed criminal record included two convictions for carrying deadly weapons and one for assault. No request for the criminal record had been made by the defense.

In sustaining the conviction, the Supreme Court held that the victim's criminal record was not sufficiently "material" to require reversal in the absence of its disclosure. The Court rejected the argument that materiality, in the constitutional sense, was established whenever it could be shown that the undisclosed evidence "might have helped the defense, or might have affected the outcome of the trial." *Agurs*, 427 U.S. at 109, 110. Instead, the Court held that evidence was "material" only "if the omitted evidence created a reasonable doubt that did not otherwise exist..." Id. at 112; *United States v. Brown*, 562 F.2d 1144, 1150 (9th Cir. 1977).

> In Agurs, the Court also stressed that Brady does not require "open file" discovery:
> If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice. Whether or not procedures authorizing such broad discovery might be desirable, the constitution surely does not demand that much.

427 U.S. at 112.

A general request for all favorable information, as made by the defense in the instant motion, puts the defense in no better position than if no request at all had been made. As previously stated, the United States has met and will continue to meet its obligations under *Brady* in a timely fashion. As *Agurs* demonstrates, however, it is not required to allow the sort of fishing expedition requested by defendant in this case.

Undeterred by the absence of any evidence, Bonds nonetheless insinuates that the WDWA's evaluation of the case against Hoskins was influenced by the fact that Hoskins was

familiar with Bonds's knowing receipt and use of steroids. Bonds asserts an entitlement to comb through the totality of the NDCA's and WDWA's internal reports, memoranda, and correspondence regarding the charging decision in this case based upon the unsupported belief that exculpatory material will be found within the government's files with respect to the charging decision in that case.

Bonds has no facts to support his request, and no legal entitlement to these materials should they exist. No deal was reached between Hoskins and the government which caused the WDWA to decline prosecution in the case against Hoskins. The government has already disclosed the underlying FBI reports concerning the investigation that led to the declination. The government respectfully requests that the Court reject this motion, as it is nothing more than a request to engage in a "fishing expedition" into government files based upon the type of purely speculative argument which the discovery rules are designed to preclude.

The United States Attorney's Office for the NDCA did not influence the prosecutive decision pertaining to the Hoskins case, nor was prosecution declined in exchange for his testimony. The WDWA's decision was made strictly upon the evidence–or lack thereof–resulting from the investigation commenced by Bonds's referral.

IV. CONCLUSION

For the foregoing reasons, the defendant's request for additional internal U.S. Attorney's Office documents and information pertaining to the WDWA's declination of the referral pertaining to Hoskins should be denied.

DATED: January 7, 2011

Respectfully submitted,

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