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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 UNITED STATES OF AMERICA,) Case No. CR 07 0732 SI
19)
20 Plaintiff,) **DEFENDANT’S RENEWED MOTION**
) **IN LIMINE TO EXCLUDE HOSKINS**
21 vs.) **RECORDING; AND SUPPORTING**
) **MEMORANDUM**
22 BARRY LAMAR BONDS,)
) Date: February 11, 2011
23 Defendant.) Time: 11 a.m.
) Judge: The Honorable Susan Illston
)

24 **INTRODUCTION**

25 Defendant Barry Bonds hereby renews his *in limine* motion to exclude from evidence the
26 entirety of an audio-recording of an alleged conversation between Steve Hoskins and Greg
27 Anderson. (See Government Exhibit No. 44.) In previously denying Mr. Bonds’s motion in part
28

1 and without prejudice, the Court reasoned that, when read together, two different portions of the
2 conversation might be understood as containing statements against interest that would be
3 admissible under Fed.R.Evid. 804(b)(3).

4 Defendant now asks the Court to depart from its previous ruling on the grounds that (1) it
5 applied too forgiving a standard in assessing the government's foundational showing and (2) as a
6 factual matter, it erroneously evaluated the two relevant portions of the recording when it deemed
7 them to be interrelated. As demonstrated below, the government's foundational burden is
8 demanding and, assessed under factual analysis previously employed by the Court, the
9 government has not and cannot demonstrate a relationship between the portions of the recording
10 sufficient to permit admission of the challenged statements. Accordingly, the Court should
11 exclude the Hoskins recording in its entirety.

12 **FACTS AND PROCEDURAL POSTURE**

13 On January 15, 2009, Mr. Bonds filed a motion *in limine* that sought, in part, to exclude
14 an audio-recording of a purported conversation between Greg Anderson (Bonds's then-personal
15 trainer) and Steve Hoskins (Bonds's then-business manager) (hereafter the "recording") that
16 apparently occurred in the Giants' locker room during the Spring of 2003. (See Defendant's
17 Memorandum In Support of Motion *In Limine* to Exclude Evidence (Dkt. No. 82), at 20.¹) Mr.
18 Bonds argued that the recording should be excluded because the statements it contained were
19 irrelevant, inherently unreliable and, as to Mr. Bonds, inadmissible hearsay. (*Id.*)

20 In opposition to Bonds's motion, the government asserted that the conversation was
21 admissible because Anderson's statements were against his interest (Fed.R.Evid. 804(b)(3)) and
22 pursuant to the residual exception to the hearsay rule (Fed.R.Evid. 407). (See Government's
23 Opposition to Defendant's Motion *In Limine* (Dkt. No. 87), at 41-46.) In support of its
24 argument, the government supplied the Court with a transcript that purportedly set forth the
25

26
27 ¹ Defendant does not concede that the recording is authentic, although for purposes of this
28 discussion he assumes that the government will be able to comply with controlling authentication
requirements.

1 relevant exchanges between Hoskins and Anderson.²

2 In an order dated February 19, 2009, the Court granted the motion in part and denied it in
3 part, without prejudice. (See Order Re: Defendant's *In Limine* Motions (Dkt. No. 137) (hereafter
4 the "Order").) To facilitate its analysis, the Court divided the recording, as transcribed and
5 proffered by the government, into three sections:³

- 6 • Part A consisted of the first portion of the recording in which Hoskins refers to
7 "Barry taking those shots" and then he and Anderson appear to discuss how to
8 avoid infections from applying "shots" of "shit."
- 9 • Part B consists of the middle portion of the recording during which Anderson
10 seemingly discloses his strategy to keep his athletes' use of unidentified
11 substances undetected by Major League Baseball's urine testing program.
- 12 • Part C consists of the latter portion of the recording during which Anderson
13 describes what he is "doing at this point," explains that it is undetectable, and
14 agrees with Hoskins that it is the "same shit Marion Jones and them was using [at
15 the Olympics]."

16 The Court granted Mr. Bonds's motion to exclude Part B of the recording and denied the
17 motion to exclude without prejudice as to Parts A and C. (Order, at 16-17.)

18 With regard to Parts A and C, the Court posited an analysis that might, in the Court's
19 opinion, render the statements admissible as statements against interest under Rule 803(b)(3).
20 First, the Court noted that in Part A, Anderson discussed how to avoid infections when injecting
21 a substance. (Order, at 16.) Second, the Court observed that, "[b]ased on the section of the
22

23 ² At certain points relevant to this motion, and as noted further below, the government's
24 transcript, on which the Court later relied in its ruling, is demonstrably inaccurate. Accordingly,
25 defendant submits as Exhibit A his own transcript of the recording. Defendant does not believe
26 that the disposition of this motion hinges on the differences between the government and defense
27 versions but, to the extent that the Court determines that resolution of any such differences is
28 important, he urges the Court to listen to the recording itself.

³ Defendant's transcript (Exhibit A) is divided into sections A, B, and C, corresponding to
the Court's divisions of the government transcript incorporated into the Order.

1 conversation labeled C, a trier of fact could conclude that the substance in question is the ‘same
 2 stuff’ being used by runner Marion Jones and other athletes at the Olympics.” (Order, at 16-17.)
 3 Reading the two parts together, the Court anticipated that “Anderson’s statements that he created
 4 and injected an undetectable substance into defendant” might constitute statements against
 5 interest if that substance was illegal at the time of the conversation — i.e., Spring, 2003. (*Id.*)
 6 Thus, the Court left the door open for the government to argue that Parts A and C of the
 7 recording are admissible, while stating that to pass through that door, the government would have
 8 to lay a foundation that “the stuff that worked at the Olympics” was illegal in Spring 2003.
 9 (Order, at 17.) It is now time to close that door.

10 ARGUMENT

11 **I. THE COURT ERRED IN INFERRING THAT THE POTENTIALLY 12 UNLAWFUL SUBSTANCE DISCUSSED IN PART C OF THE 13 RECORDING IS THAT DISCUSSED IN PART A AND IN RULING THAT 14 THE DISPUTED STATEMENTS MIGHT BE ADMISSIBLE ON THIS 15 BASIS**

14 **A. General Principles**

15 **1. Fed.R.Evid. Section 804(b)(3) and Statements 16 Against Interest**

17 In order to secure admission of a hearsay statement as against the declarant’s interest
 18 within the meaning of Rule 804(b)(3), the proponent must demonstrate that the declarant is
 19 unavailable as a witness and that:

20 (A) a reasonable person in the declarant's position would have
 21 made [the statement] only if the person believed it to be true
 22 because, when made, it was so contrary to the declarant's
 23 proprietary or pecuniary interest or had so great a tendency to
 24 invalidate the declarant's claim against someone else or to expose
 25 the declarant to civil or criminal liability; and

26 (B) [the statement] is supported by corroborating circumstances
 27 that clearly indicate its trustworthiness, if it is offered in a criminal
 28 case as one that tends to expose the declarant to criminal liability.

25 *Ibid.*

26 Subsection 804(b)(3)(B)’s requirement of corroborating circumstances as to any
 27 statement offered as one “that tends to expose the declarant to criminal liability” is the product of
 28 an amendment that took effect in December, 2010. The present subsection represents an

1 expansion of the former version — applicable at the time of the Court’s 2009 Order — which
 2 required corroboration only as to statements against interest offered to *exculpate* the accused,
 3 rather than to any statement that, as here, purportedly tends to incriminate the declarant, whether
 4 offered for or against the accused. As stated in the Advisory Committee’s Note to the 804(b)(3)
 5 amendment, “A unitary approach to declarations against penal interest assures both the
 6 prosecution and the accused that the Rule will not be abused and that only reliable hearsay
 7 statements will be admitted under the exception.”

8 **2. Preliminary Determination and the Burden of Proof**

9 The proponent of the evidence bears “the burden of establishing a foundation from which
 10 to conclude that the statement was within a hearsay exception.” *Los Angeles News Serv. v. CBS*
 11 *Broad., Inc.*, 305 F.3d 924, 934, as amended by 313 F.3d 1093 (9th Cir.2002) (citation omitted)
 12 The Federal Rules of Evidence govern questions relating to the adequacy of the foundation
 13 proffered in support of such an exception. Thus, Rule 104(a) states:

14 **(a) Questions of Admissibility Generally.** Preliminary questions
 15 concerning the qualification of a person to be a witness, the
 16 existence of a privilege, or the admissibility of evidence shall be
 17 determined by the court, subject to the provisions of subdivision
 18 (b). In making its determination it is not bound by the rules of
 19 evidence except those with respect to privileges.

20 *Ibid.*

21 It is well settled that whether or not a disputed statement qualifies under a proffered
 22 exception to the hearsay rule is a matter determined by the Court pursuant to Rule 104(a), rather
 23 than one involving issues of “conditional relevance” that may be submitted to the jury under Rule
 24 104(b).⁴ As Wright and Graham observe:

25 Rule 104(a) takes the orthodox position; the preliminary fact
 26 questions on the admission or exclusion of hearsay are all for the

27 ⁴ Fed.R.Evid. 104(b) states:

28 **(b) Relevancy conditioned on fact.** When the relevancy of
 evidence depends upon the fulfillment of a condition of fact, the
 court shall admit it upon, or subject to, the introduction of evidence
 sufficient to support a finding of the fulfillment of the condition.

1 judge. The hearsay rule rests on a policy that the jury may not fully
 2 appreciate, requires the drawing of subtle distinctions, and
 3 frequently requires that the evidence itself be examined to
 4 determine its admissibility — all reasons that the policy of Rule
 5 104 suggests should make the judge the factfinder, rather than the
 6 jury. The courts and state and federal treatise writers all agree.

7 21A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5053.3
 8 (2d ed.2005) (footnotes omitted). See also *Bourjaily v. United States*, 483 U.S. 171, 174-175
 9 (Court must proceed under Rule 104(a) in deciding whether disputed statement qualifies under
 10 co-conspirator statement exception to hearsay rule).

11 Finally, it is equally well-settled that the proponent bears the burden of proving the
 12 applicability of a hearsay exception by a *preponderance* of the evidence rather than the lesser
 13 standard applicable to questions arising under Rule 104(b). *Bourjaily*, 483 U.S. at 175; see also
 14 *In re Napster Copyright Litigation*, 479 F.3d 1078, 1096 (9th Cir. 2007) (“And we know from
 15 *Bourjaily* that preliminary questions of fact under Rule 104(a) must be established by a
 16 preponderance of the evidence.”); *United States v. Franco*, 874 F.2d 1136, 1139 (7th Cir.1989)
 17 (citing *Bourjaily* and stating, “When making preliminary factual inquiries about the admissibility
 18 of evidence under a hearsay exception, the district court must base its findings on the
 19 preponderance of the evidence.”)

20 **B. The Court Imposed Too Lenient a Burden of Proving That the**
 21 **Statements Qualified under the Hearsay Exception**

22 In its Order, the Court correctly set forth the then-governing criteria for determining
 23 whether a hearsay statement was against the declarant’s interest within the meaning of Rule
 24 804(b)(3). (Order, at 3-4.⁵) But, as noted, in discussing the burden of proof applicable to the
 25 government’s foundational showing, the Court stated:

26 Based on the section of the conversation labeled C, *a trier of fact*
 27 *could conclude* that the substance in question [i.e., that discussed
 28 in section A] is the “same stuff” being used by runner Marion
 Jones and other athletes at the Olympics.

(Order, at 16-17 (emphasis added).) Again, relying on this finding, the court further reasoned

⁵ The Court did not, and had no cause to, analyze the disputed statements pursuant to the
 corroboration requirement imposed by the 2010 amendment to Rule 804(b)(3). (Order, at 16-17.)

1 that if the section C substance was unlawful, then Anderson’s discussion of using and/or
2 administering that substance in sections A and C could be viewed as contrary to his interests
3 under Rule 804(b)(3). (Order, at 17.)

4 The Court’s critical finding as to what “a trier of fact could conclude,” however, is a
5 relatively low standard of proof that is appropriate only for purposes of admitting “conditionally
6 relevant” evidence under Fed.R.Evid. 104(b). See note 4, supra; Advisory Committee Note to
7 Rule 104(b) (In applying Rule 104(b), “[t]he judge makes a preliminary determination whether
8 the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the
9 item is admitted. . . .”) Such a standard plainly does not apply to assessments of admissibility
10 pursuant to a hearsay exception under Rule 104(a), which, as discussed, requires a showing that
11 the exception’s requirements are satisfied by a *preponderance* of the evidence.

12 Simply stated, it was not enough that a trier of fact *could conclude* the substances
13 discussed in sections A and C were the same, and hence, that discussing use of both such
14 substances, if unlawful, satisfied Rule 804(b)(3). The government must instead be put to the
15 more demanding burden of persuading the Court that the substances were more likely than not
16 the same. The government failed to do so during the earlier proceeding and, for the reasons
17 discussed further below, cannot do so now.

18 **C. The Government’s Showing Does Not Support an Inference That the**
19 **Substances Discussed by Anderson Were the Same and that**
20 **Admission of the Statements is Authorized on that Basis**

21 As a factual matter, defendant further submits that the Court erred when, based on the
22 transcript, it concluded that the substances referred to in Parts A and C were, or even might have
23 been, the same — i.e. that the substance Anderson said he was “injecting” in Part A was the same
24 undetectable substance that he said Marion Jones used during the Olympics. They were not.

25 In Part C of the recording, Anderson starts by talking about the substances that he was
26 using at that current time: “But the whole thing is . . . *everything that I’ve been doing at this*
27 *point, it’s all undetectable.*” (Exhibit A, at 16 (emphasis added).) In response to a question by
28 Hoskins, Anderson then confirms that he was then using the same stuff that Marion Jones used,
“the same stuff that worked at the Olympics.” (*Id.*)

1 There is no doubt that this is a reference to the “clear” and/or the “cream,” substances
2 which Bonds repeatedly admitted having used in 2003 during his testimony to the grand jury.
3 (Grand Jury Transcript, at 23-30.) Indeed, the government’s indictment of Marion Jones charged
4 her with two counts of false statements to government agents, the first of which was founded on
5 Jones’s purportedly false denial of having seen, received, or used the “clear” (and not any other
6 substance), a count to which Jones admitted guilt in her October 5, 2007 plea agreement with the
7 government. (See Exhibits B and C to this motion, Jones indictment and plea agreement.) The
8 government did not refer to substances other than the clear or the cream at the February 5, 2009
9 in limine hearing on this issue. (See Transcript of February 5, 2009 hearing (Dkt. No. 106), at
10 12-15.)

11 It is not, and cannot be, disputed that neither the “clear” nor the “cream” — the
12 undetectable substances that Anderson obtained from BALCO in 2003 — was injected or
13 injectable. To the contrary, the “clear” was administered by using a tube or eye-dropper to place
14 drops under the tongue, while the “cream” was simply rubbed onto the skin. (Grand Jury
15 Transcript, 24-26)

16 By contrast, the entirety of the discussion in Part A of the audio-recording is devoted to
17 injections and injectable substances. Consequently, whatever the substance or substances to
18 which Hoskins referred in Part A of the recording may have been, it was not, or they were not,
19 an “undetectable substance” that Anderson said he was then using and to which he referred in
20 March 2003. We can be certain of this because *those* substances — the clear and the cream —
21 were not injected.

22 Furthermore, the temporal references in the challenged statements similarly undermine
23 any inference that Anderson was discussing the identical substances in sections A and C. In
24 section C, Anderson, by all accounts, refers to “everything [he’s] been doing at *this* point . . .”
25 with respect to undetectable substances. (United States Opposition to Motion in Limine (Dkt.
26 99), at 44; Order, at 16; Exhibit A, at 4 (emphasis added).) In section A, again by contrast,
27 Hoskins refers to the injection of a substance(s) in the *past* tense: “You know when Barry *was*

1 *taking those shots...*”;⁶ and “Is that why Barry *didn’t just shoot* it in his butt all the time?”⁷
2 (Exhibit A, at 1 (emphasis added).) Thus, in section C Anderson discusses substances he was
3 using in the present, while in section A he discusses those he used in the past.

4 Given these circumstances, it would be logically erroneous to equate the substances
5 referred to in Parts A and C of the recording. Therefore, even were the government to lay a
6 foundation that “the clear” and “the cream” were illegal substances in March 2003, that
7 foundation would not speak to the lawfulness of the substance(s) discussed in Part A of the
8 recording. There is accordingly no basis for concluding that Anderson’s statements in Part A
9 tended to subject him to criminal or civil liability, and they cannot be admitted under Rule
10 804(b)(3).

11 As to part Part C of the recording, it is rendered irrelevant by Mr. Bonds’s testimony to
12 the grand jury in which he admitted using the “clear” and “cream.” Mr. Bonds testified that he
13 used those substances during the 2003 season — the very time frame in which the conversation
14 was apparently recorded and about which Mr. Anderson was speaking. (Grand Jury Transcript,
15 at 23-30.) Moreover, whatever limited relevance might arguably exist for the statements in Part
16 C is greatly outweighed by the potential for confusion, prejudice and delay. Consequently, Part C
17 of the recording should be excluded under both Rules 402 and 403.

18 Finally, apart from the fact that the government has not and cannot sustain its burden of
19 establishing the key *factual* predicate for securing admission of the statements based on their
20 purported meaning, it is equally unable to demonstrate the presence of corroborating
21 circumstances that “*clearly indicate* the trustworthiness” of the challenged statements, as Rule
22 804(b)(3) now requires. *Ibid.* (emphasis added). This constitutes yet another reason why the
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25 ⁶ The government’s transcript of the recording incorrectly reads “You know, when
26 *Barry’s taking those shots...*” (See, United States Opposition to Motion in Limine (Dkt. 99), at
42; Order, at 14.)

27 ⁷ The government’s transcript of the recording incorrectly reads, “Is that why Barry’s [sic]
28 *didn’t do it in one spot, and you didn’t just let him do it one time?*” (See, United States
Opposition to Motion in Limine (Dkt. 99), at 42; Order, at 15.)

1 Court should order the challenged statements excluded.

2 **CONCLUSION**

3 For the reasons set forth above, the Court should issue an order excluding the Hoskins
4 recording in its entirety.

5 Dated: January 7, 2011

Respectfully submitted,

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