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11 BARRY BONDS

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

16 UNITED STATES OF AMERICA,
17 Plaintiffs,
18 vs.
19 BARRY LAMAR BONDS,
20 Defendants
21

) Case No.: CR 07-0732 SI
)
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
) DEFENDANT'S MOTION TO
) REQUIRE GOVERNMENT TO
) PROVIDE INFORMATION ABOUT
) THE DECISION NOT TO
) PROSECUTE STEVEN HOSKINS

22 Date: January 21, 2011
23 Time: TBA
24 Judge: The Honorable Susan Illston

24 I. INTRODUCTION

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

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

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

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

17 This Motion seeks information about the reversal of fortune enjoyed by Hoskins
18 after he offered to help the Government in its pursuit of Mr. Bonds. The Government is
19 plainly obliged to provide this information under *Brady v. Maryland* (1963) 373 U.S. 83,
20 83 S.Ct. 1194, 10 Law Ed. 2nd 215 (hereafter “*Brady*”). Evidence tending to impeach a key
21 prosecution witness must be turned over to the defense under *Brady*. See *Silva v.*
22 *Woodford* (2002, CA 9 Cal.) 279 F.3d 825, 855; *Giglio v. United States* (1972) 405 U.S.
23 150, 154, 92 S.Ct. 763, 31 L.Ed.2nd 204, *United States v. Bagley* (1985) 473 U.S. 667, 676,
24 105 S.Ct. 3375, 87 L.Ed.2d 481:

25 Impeachment evidence ... as well as exculpatory
26 evidence ... falls within the *Brady* rule ... such
evidence is ‘evidence favorable to an accused.’ ...

27
28 ¹ The quoted language is from the Government’s report of its meeting with Hoskins on April 26, 2005. Reports of the
Hoskins Interviews are not attached, because they were provided in discovery by the Government, and in this Motion
the content of the interviews is not in dispute.

1 **II. FACTS**

2 Hoskins is a Key Prosecution Witness.

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

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

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

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

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

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

28 This is best summarized by a brief chronology.

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

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

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

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

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

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

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

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

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

27 A copy of this letter is attached as Exhibit “A”.

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

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

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

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

10 March 17, 2006, July 16, 2006, July 17, 2006, December 10, 2007, February
11 26, 2009 – Hoskins was interviewed by Agent Novitzky and others.

12
13 Defendant Has Repeatedly Asked the Government for Information Concerning the
14 Decision Not to Prosecute Hoskins.

15 Defense counsel have informally tried again and again to obtain information about
16 how and when the Hoskins case made its way to Seattle, and the bases for the decision not
17 to prosecute Hoskins. On January 20, 2009, defense counsel asked for “documents
18 comprising the referral of Mr. Bonds’ report of law violations to federal authorities in
19 Seattle, Washington.” On February 24, 2009, defense counsel asked the Government for
20 “documents comprising the referral of Mr. Bonds’ report of law violations by Stevie
21 Hoskins to federal authorities in Seattle, Washington, as well as documents showing that
22 prosecution was declined.” Substantially the same requests were repeated on August 24,
23 2010 and September 8, 2010.

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

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

3 The Government's response to repeated requests for documents pertaining to the
4 nonprosecution of Hoskins is summed up in their letter to defense counsel of August 30,
5 2010:

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

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

17 **III. ARGUMENT**

18 **A. Evidence of Leniency to a Key Prosecution Witness Must be Provided to** 19 **the Defense.**

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

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

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

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

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

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

25 *Id.* at pp. 690-691.

26 Finally,

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

1 California Criminal Discovery, *supra*, §1:29.7 at page 85, citing *Belmontes v. Woodford*
2 (2003, CA 9 Cal.) 335 F.3d 1024, 1043.

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

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

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

22 **IV. CONCLUSION**

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

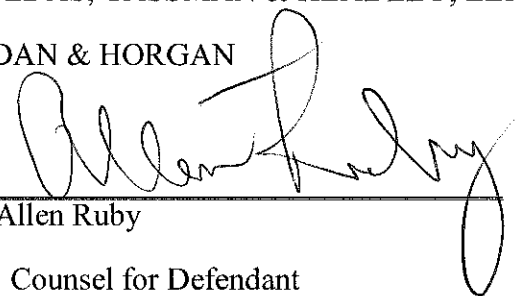
- 25 1. All investigation reports and other documents which formed the basis for the
26 decision not to prosecute Hoskins;
- 27 2. Any communications concerning Hoskins from investigators and attorneys in
28 the Northern District of California to law enforcement in the Western District of
Washington or elsewhere; and
3. Any other information concerning the decision not to prosecute Hoskins.

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Dated: December 17, 2010

Respectfully submitted,
LAW OFFICES OF ALLEN RUBY
ARGUEDAS, CASSMAN & HEADLEY, LLP
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By 
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U.S. Department of Justice

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November 2, 2005

VIA FAX 925-274-2910

Michael Cardoza
The Cardoza Law Offices
1111 Civic Drive, Suite 320
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Dear Mr. Cardoza:

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

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

Yours truly,

JOHN MCKAY
United States Attorney

MARK PARRENT
Assistant United States Attorney