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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BARRY LAMAR BONDS, Defendant.	Case No. CR 07 0732 SI **REPLY MEMO IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE ONE: RE TESTIMONY BARRED BY FEDERAL RULES 402, 403, AND 802** Date: March 1, 2011 Time: 1:30 p.m. Courtroom of the Honorable Susan Illston

INTRODUCTION

At one point in the government's motion in limine filed on February 14th, it implored the Court to exclude evidence that would "add nothing except an element of prurience at odds with the decorum befitting a court of law and the respect due to the jury." (Govt. Mot., at 16.) Apparently the government exempts from "prurient" any and all evidence that it might choose to

offer. Its Opposition to the defense motion in limine insists on the right to introduce a universe of evidence concerning subjects short on relevance but long on titillation: Mr. Bonds' comments on race and money; his irritability during medical examinations by Doctor Ting, Mr. Bonds' personal physician; the urine specimens of Dr. Ting's son; prescriptions for Viagra and Valtex; discussions of revealing photos; the defendant's "dominating and controlling" personal relationships; his 'efforts to control his surroundings and the people around him;" his "disrespect for the law and the attitude that rules do not apply to him;" and "the defendant's angry, threatening, and violent communications and conduct." (United States' Opposition to Defendant's Motion In Limine One: To Bar Testimony Pursuant to Federal Rules 402, 403, and 802 [hereafter "Opp."], at 2-13). The government envisions a trial scripted by the National Enquirer.

Needless to say, virtually all of this proffered evidence concerns the defendant's purported personality and character. As discussed in prior briefing, however, by its express terms, Fed.R.Evid. 404(a) prohibits evidence of a person's character "for the purpose of proving action in conformity therewith on a particular occasion." *Id. see also United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994). Likewise, Fed.R.Evid. 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," also with exceptions not applicable here. The Supreme Court has stated that:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. [note omitted] Not that the law invests the defendant with a presumption of good character . . . but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The inquiry is not rejected because character is irrelevant; [noted omitted] on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson v. United States (1948) 335 U.S. 469, 475-76. *See also Old Chief v. United States*

(1997) 519 U.S. 172, 180-81 ("[G]eneralizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily) [comprises unfair prejudice to the defendant]."). That being so, "[i]f the government offers prior offense evidence, it must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed . . offenses before, he therefore is more likely to have committed this one." *United States v. Sampson* (3d Cir. 1992) 980 F.2d 883, 887.[1]

In light of those principles, it is simply astonishing that the government's Opposition omits any reference whatsoever to the bar on character evidence found in Fed. R. Evid. 404; a fortiori, the government has offered no explanation of how that bar can be surmounted in this matter. Furthermore, introduction of any of the government's proffered evidence at best would require rebuttal in kind on matters such as Mr. Bonds's sexual prowess, his charitable activities, and his amicable relations with his chef, thus requiring "mini-trials' on subjects of tangential relevance. If the defendant's trial is to be conducted with "the decorum befitting a court of law and the respect due to the jury" demanded by the government, then the defendant's motion to exclude the specific items raised in its motion in limine and discussed again below must be granted.

IN LIMINE OBJECTIONS

A. Reference to Mr. Bonds's Exercise of His Fifth Amendment Privilege

The government argues for the admission of the statement read by the AUSA in the grand jury proceedings to the effect: "Barry Bonds is likely to refuse to testify on the basis of his Fifth Amendment privilege against self-incrimination defense." (Opp., at 2-3.) Indisputably, the

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[1] *See also* George Fisher, *Evidence* 144-49 (2002); Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 216-25 (2d ed. 1983); Edward Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 583 (1990).

statement is an out of court statement not subject to cross-examination which cannot be admitted for the truth of what it asserts: that Mr. Bonds was likely to refuse to testify based on his Fifth Amendment privilege. Furthermore, even if Mr. Bonds were likely to rely on that privilege, the jury could draw no inference from that fact, as the government concedes. *Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610 (1976). Therefore, if the statement were to be placed before the jury, the Court would have to instruct that (a) the statement cannot be taken as true; and (b) no inference of any kind could be drawn from it. The statement is thus both utterly irrelevant and potentially prejudicial, as a juror might improperly assume that some one who invokes the Fifth amendment has something to hide. It must be excluded. As earlier noted, the defense does not object to the other portions of the Grand Jury Transcript in which Mr. Bonds is informed that he has been immunized

B. Reference to Mr. Bonds' Comments on Race and Money

The government's response on this issue is hyperbolic and doctrinally obtuse. The exchange in question involved some jousting between Mr. Bonds and a grand juror at the close of the grand jury proceedings. The government claims that the response is "highly probative" to show that Mr. Bonds is "parsimon[ious];" it "exhibits the attitude and control he had in his relationship with Anderson," and establishes the "defendant's approach to money." (Opp., at 4) The relevancy of every one of these extravagant claims rests on an inferential chain that moves from the comment to Mr. Bonds' character to his guilt of the charged crime. (See, e.g. Opp., at 4-5: "his stated concerns about money tie directly into his motivation to cover up the role steroids had in his athletic achievement and the considerable financial benefits his achievements generated.") The comments are plainly barred by Fed. R. Evid. 404. *See also United States v. Mitchell* 172 F.3d 1104, 1108-09 (1999) ("A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value.").

Furthermore, were the comments admitted, Mr. Bonds would be entitled to call a number of witnesses to rebut the character inferences the government seeks to draw from them.

Introduction of the comments is thus barred by Fed. R. Evid. 403 as well.

C. Speculation By Dr. Ting As To Whether Mr. Bonds Was on Steroids

The testimony objected to by the defense consists of statements by Dr. Ting before the grand jury that he did not know if Anderson was giving Mr. Bonds steroids and he never asked Anderson if he was. Obviously that testimony has no probative value on the issue of whether Anderson ever gave PEDs to Mr. Bonds.

The government claims that the testimony is "certainly relevant to the context in which Ting treated and observed the defendant" and to "Ting's decision not to confront Anderson, and is relevant to resolve any confusion the jury might have about Ting's motivations." (Opp., at 5-6) But "the context in which Ting treated and observed the defendant," "Ting's decision not to confront Anderson," and "Ting's motivations" are not matters in issue in this case. The government would like to hear the word "steroids" enunciated during Dr. Ting's testimony, but that enunciation would occur only in the context of non-probative but highly prejudicial speculation. The evidence must be excluded under Fed. R. Evid. 402 and 403.

D. Speculation That Dr. Ting Overheard Greg Anderson Talking To Mr. Bonds About Anabolic Steroids

The defense has objected to admission of testimony by Dr. Ting that on one occasion he overheard Mr. Bonds tell Anderson not to talk to Mr. Bonds' father about anything. The government wants this testimony admitted to suggest that Mr. Bonds was referring to steroid use. But there are myriad subjects as to which Mr. Bonds would not want to trouble his father, who was quite ill at the time. Dr. Ting testified that he did not know what was being discussed between Mr. Bonds and Anderson on the occasion in question. The government will be unable to establish that Dr. Ting has a "lay opinion...rationally based on the perception of the witness" that the reference was to steroid use. (Opp., at 6, citing Fed. R. Evid. 701) The testimony therefore must be excluded under Fed. R. Evid. 701, 402, and 403.

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E. Ting Testimony that Mr. Bonds Berated People

The government seeks to admit testimony from Dr. Ting that in his treatment of Mr. Bonds, his patient was "waiting for you to do something so that he can critiicize you." (Opp, at 7). The government claims that this proves the defendant had the "traits' of being "a difficult, manipulative, and confrontational patient..." (*Id.*) It is usually the defense that argues that certain evidence proffered by the government seeks to establish his character "traits," because such evidence is unequivocally prohibited by Fed. R. Evid. 404(a). Here, the government's own assessment of its evidence establishes its inadmissibility.

F. Any Reference to Dr. Ting's Sons and His Medical Board Problems

The government's attempt to justify the admission of testimony concerning Dr. Ting's testing of his son's urine and Ting's being disciplined by the Medical Board borders on the bizarre. These matters simply have nothing to do with the charges against the defendant, and the contention that this Court's time should be expended on a discussion of the supplements taken by Doctor Ting's son and the testing of the son's urine is ridiculous.

G. Testimony that Steve Hoskins Obtained Prescription Medicines from Dr. Ting

The government claims the right to prove that "the defendant was willing to obtain prescription drugs in a surreptitious manner' because 'his past deceptive use of other medications. . . is highly probative." (Opp., at 9.) The government cannot possibly make that argument for admissibility in the face of Fed. R. Evid. 404, which is no doubt why it again simply ignores that critical provision.

H. Any Out of Court Statement Purportedly Made to Steve Hoskins By a Third Party Which The Court Has Not Previously Ruled Admissible at a Hearing Outside the Presence of the Jury

The defense asked the Court to require the government to proffer any hearsay statement to be testified to by Steve Hoskins at a hearing outside the presence of the jury. The government asks the Court to deny the motion, yet appears to agree to the requirement of a hearing requested by the defense. (Opp., at 9: "The government will be prepared to provide a basis for the

admissibility of all statements to which Hoskins will testify at trial.") Thus the Court should grant the defense request on this point.

I. Testimony From Kathy Hoskins

1. Statements Concerning Mr. Bonds's Relationship with Pieret Aava and Photographs of Her

Testimony by Kathy Hoskins concerning the defendant's purported relationship with Ms. Aava, including a discussion of revealing photographs, is precisely the sort of irrelevant titillation that has no place in a trial of this case. Ms. Hoskins can certainly describe the nature of her relationship with the defendant in sufficient detail to allow the jury to assess her credibilty without descending to tabloid fare by introducing the subject of sexual relations.

The prosecution maintains that Mr. Bonds denied having an affair in a conversation with federal agents. (Opp., at 10) Such a specific instance of a falsehood on a collateral matter may be admissible on the issue of credibility, but only upon cross-examination if Mr. Bonds testifies. Fed. R. Evid. 404, 405(a).

2. Statements That Mr. Bonds Treated Greg Anderson Disrespectfully

For the reasons stated above, testimony by Hoskins that "Anderson was someone whom the defendant dominated and bullied" (Opp., at 11) is inadmissible character evidence, and its admission would necessitate the admission of a wealth of evidence by the defense as to the true nature of their relationship. The evidence must be excluded under Fed. R. Evid. 404 and 403.

3. Statements Describing Mr. Bonds's Relationship with His Wife

The government does not oppose the defense request for exclusion of Hoskins's testimony on this issue.

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J. Testimony from Kimberly Bell

1. Statements that Mr. Bonds was Disrespectful and Abusive to Others

The prosecution's own description of this evidence as "probative to the defendant's tendency to control people" (Opp., at 12) and thus "probative of his intent to obstruct justice" constitutes the basis for its exclusion under Fed. R. Evid. 404, as well as rule 403.

2. Statements As To Why Mr. Bonds Married Liz Bonds

The government does not oppose the defense request for exclusion of Bell's testimony on this issue.

3. Testimony that Mr. Bonds told Ms. Bell to Deposit Cash in Increments

The government's Opposition states the following: "Evidence of his efforts to manipulate the financial reporting system through the structuring of cash deposits is relevant to demonstrating his disrespect and the attitude that rules do not apply to him." (Opp., at 13). There can be no better description of the precise character evidence barred by Fed. R. Evid. 404. That the government does not even attempt to argue for admission of the evidence under rule 404(b) seals the case for its exclusion.

4. Statements That Mr. Bonds' Temperament Changed or That on One Occasion He Threatened Violence

This issue has been briefed elsewhere. Needless to say, injecting the collateral issue of alleged domestic violence into this trial would be wildly prejudicial and consume an enormous amount of court time, as Mr. Bonds calls witnesses to attest to the true nature of his relationship with Ms. Bell. Furthermore, Ms. Bell claims a single instance of physical aggression occurred at the end of their long relationship, during much of which the government claims that Mr. Bonds was taking steroids. The notion that single purported instance can be scientifically attributed to

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steroid use as opposed to a myriad of other causes is nonsense. Given its potential for prejudice, testimony concerning that incident surely must be excluded under Fed. R. Evid. 403.

Dated: February 24, 2011

Respectfully submitted,

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