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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 MOTIONS *IN LIMINE*
“SIX” (DOCKET #282)**

Date: March 17, 2011
Time: 11:00 a.m.
Judge: Honorable Susan Illston

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19 **INTRODUCTION**

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21 The defendant moves to exclude (1) voicemail recordings he left for Kimberly Bell; (2)
22 testimony by Special Agent Jeff Novitzky regarding admissions made by the defendant’s
23 personal trainer, Greg Anderson, in 2003; and (3) “racially charged testimony.” The voice mail
24 recordings are admissible and should be admitted. The United States intends to introduce
25 evidence of Anderson’s statements to Agent Novitzky only for non-hearsay purposes that do not
26 implicate the Confrontation Clause. The defendant has failed to identify the evidence he claims
27 is “racially charged,” and the United States is therefore unable to provide a meaningful response

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1 to this latter claim.

2 The defendant also claims that the United States's witness and exhibit lists contain three
3 categories of evidence previously excluded by this Court. Docket #282 at 5-6. He is wrong
4 regarding the anticipated testimony from Agent Novitzky about the materiality of the defendant's
5 statements to the grand jury investigation, and the testimony from Bell about the defendant's
6 violent behavior as a side effect of steroid use. This Court has previously ruled both lines of
7 testimony admissible in considering the defendant's previous motions *in limine*. As to the
8 defendant's immunity order, the United States does not intend to introduce evidence regarding
9 the defendant's likelihood of refusing to testify, and the defendant's grand jury testimony and
10 immunity order as presented to the jury will be redacted to reflect all of the Court's evidentiary
11 rulings.

12 Finally, in listing three pending motions *in limine*, the defendant supplements its prior
13 briefing without leave of this Court, arguing that the defendant's 2006 amphetamine test is
14 inadmissible. As the United States has previously argued, the defendant's use of performance-
15 enhancing substances subsequent to his grand jury testimony stating that he did not and would
16 not have knowingly used performance-enhancing substances tends to show the grand jury
17 testimony was false. This Court should defer ruling on the test's admissibility until the United
18 States attempts to admit this test, if it chooses to do so.

19 ARGUMENT

20 I. The defendant's voicemails to Bell are admissible

21 In its Second Pretrial Scheduling Order, issued on March 2, 2011, this Court denied the
22 defendant's two motions (one and two) to exclude and granted the United States's motion (H) to
23 admit Bell's testimony about the defendant's treatment of her and others, "[w]ith the exception
24 of the one incident of domestic violence" during which the defendant choked Bell. Evidence of
25 that incident was excluded "unless and until defendant opens the door and specific permission is
26 obtained from the Court." Docket #269 (Exh. A) at 5-6, 9. This Court found the defendant's
27 treatment of Bell "is relevant to the issue of defendant's relationship with [her] and therefore to
28 the veracity of her testimony," and may also be relevant to "when and whether defendant used

1 steroids.” *Id.* at 9.

2 For the same reasons this Court found that Bell’s testimony about the defendant’s
3 treatment and behavior is relevant and not unfairly prejudicial under Fed. R. Evid. 403, voicemail
4 messages – which the defendant has had in its possession since December 2007, *see* Exh. C
5 (discovery letter) – that the defendant left for Bell are relevant and admissible. The voicemails
6 are admissible as an admission by a party-opponent under Fed. R. Evid. 801(d)(2), and Bell will
7 authenticate them by recognition of the defendant’s voice during specific time periods. They are
8 relevant because they demonstrate more precisely than Bell’s descriptions could the nature of the
9 defendant’s relationship with Bell, and the veracity of her testimony – testimony which the
10 defense has indicated it intends to challenge vigorously.

11 The voice mails will also permit the jury to hear for themselves the defendant’s voice and
12 demeanor towards Bell, so that the jury can assess Bell’s testimony of that the defendant’s
13 behavior changed as result of his use of steroids. Especially since Bell is precluded from
14 describing how the defendant’s behavior after using steroids escalated to choking her, it may be
15 difficult for the jury to understand from Bell’s testimony alone how the defendant’s aggressive
16 behavior escalated after he began taking steroids.

17 That the voice mail messages do not portray the defendant in the most favorable light
18 does not make them irrelevant or unfairly prejudicial. On the contrary, permitting the
19 introduction of evidence that the defendant’s aggressive behavior became more frequent
20 addresses the concern that animated this Court’s exclusion of the incident in which the defendant
21 choked Bell – that an isolated incident at the end of their long relationship may have limited
22 probative value of either the nature of the defendant’s relationship with Bell or of steroid-induced
23 rage. *See* Exh. A at 6.

24 The defendant’s argument that the admission of these voice mail messages will waste the
25 jury’s time is based not on the United States’s proposed evidence, but on *his* threatened response
26 to the evidence by (a) putting all voice-mails the defendant left for Bell into evidence, and (b)
27 presenting evidence of Bell’s alleged sexual history. The eleven voice mail messages in question
28 are, by the defendant’s own admission, “generally short,” Docket #282 at 2, and so will not waste

1 the jury's time. As for the defendant's suggested response, this Court can prevent wasting of the
2 jury's time by (a) limiting the number of additional voice mails to a reasonable number that
3 would allow the defendant to make his point about the full context of his relationship with Bell,
4 and (b) restraining the defense from wantonly smearing Bell, and limiting impeachment of Bell
5 to matters for which the defendant has a good-faith basis to suggest, and which actually are
6 relevant to her relationship with the defendant, her biases, and her motivations.

7 Finally, there is no basis for the defendant's contention that the United States "seeks to
8 spend a good deal of its case in chief on the defendant's sexual performance." Docket #282 at 4.
9 While the impact of performance-enhancing drugs on the defendant's sexual performance is a
10 legitimate piece of proof that the defendant knowingly used these drugs and therefore lied to the
11 grand jury about his conduct, it is just one small piece of the United States' array of proof.

12 **II. The United States does not intend to introduce testimony about Anderson's**
13 **admissions to Agent Novitzky for the truth of the matters asserted**

14 The defendant asks this Court to exclude testimony from Agent Novitzky about his
15 September 3, 2003 interview with Anderson during the execution of a search warrant at his
16 residence. Docket #282 at 4-5. It is unclear how the defendant's new motion *in limine* to
17 exclude these statements was prompted by the United States's revised witness list, which remains
18 unchanged in its description of Agent Novitzky's testimony as encompassing observations during
19 the execution of search warrants at Anderson's residence in September 2003. *See* Docket #276.
20 In any case, because Anderson persists in his illegal refusal to testify at trial, pursuant to
21 *Crawford v. Washington*, 541 U.S. 36 (2004), the United States does not intend to introduce
22 evidence of Anderson's statements to Agent Novitzky for the truth of the matters asserted. The
23 defendant's confrontation rights are not implicated by the presentation of Anderson's statements
24 for non-hearsay purposes, however.

25 During Anderson's September 3, 2002 interview with Agent Novitzky, Anderson
26 admitted providing his clients, including professional athletes and Major League Baseball
27 players, with testosterone and human growth hormone, often through the use of Federal Express
28 packages. *See* Exh. D. Anderson admitted to buying the clear and the cream from Balco, and

1 providing these to some of his baseball clients. *See id.* Anderson stated that the defendant never
2 took the clear or the cream (contrary to the defendant's testimony at grand jury), and when
3 confronted with evidence to the contrary, Anderson stated that he should stop talking for fear of
4 going to jail. *See id.*

5 Under *Crawford*, 541 U.S. 36, testimonial statements may not be introduced for the truth
6 of the matter unless the declarant is unavailable to testify at trial and the opposing party had the
7 opportunity to cross-examine the statement. The United States does not intend to introduce
8 Anderson's statements to Agent Novitzky for the truth of the matters asserted.

9 However, there is no violation of the Confrontation Clause when testimonial statements
10 are admitted at trial for non-hearsay purposes. *See Tennessee v. Street*, 471 U.S. 409, 414 (1985)
11 ("The *nonhearsay* aspect of [the declarant's] confession – not to prove what happened at the
12 murder scene but to prove what happened when respondent confessed – raises no Confrontation
13 Clause concerns." (original emphasis)); *United States v. Jiminez*, 564 F.3d 1280, 1287 (11th Cir.
14 2009) (finding no violation of Confrontation Clause where detective testified about defendant's
15 brother's implication of defendant on redirect examination for limited non-hearsay purpose of
16 explaining why detective was motivated to re-interview defendant).

17 The United States intends to introduce evidence of Anderson's statements refusing to talk
18 about the defendant for the limited non-hearsay purposes of explaining both why the defendant
19 was called to the grand jury to testify and Agent Novitzky's further conduct in investigating the
20 case. Since Anderson refused to talk about the defendant when questioned at the search warrant
21 scene, it became even more material and important that the defendant be called to the grand jury
22 and testify truthfully. Additionally, the fact that Anderson attempted to protect Bonds, and then
23 stopped talking when confronted on that issue, would lead any competent investigator to believe
24 that Bonds possessed important, relevant evidence to the Balco investigation. Anderson's
25 statements at the search warrant scene provide both relevance and materiality to the defendant's
26 grand jury testimony and explain Novitzky's later investigatory conduct.

27 Anderson's statements may also be admissible in response to cross-examination attacking
28 Agent Novitzky's investigation. The United States would of course agree to an appropriate

1 limiting instruction to the jury.

2 **III. The defendant's motion to exclude any testimony concerning race is vague**

3 The defendant asks this Court to exclude any testimony "concerning the subject of race or
4 [his] attitudes on racial matters." Docket #282 at 5. In the defendant's Motion *In Limine* One,
5 he asked this Court to exclude his grand jury testimony explaining that he was not disposed to
6 give Anderson a mansion because few black people had a lot of money, and to exclude testimony
7 from Bell that he married Liz Bonds for race-related reasons. The United States responded that it
8 had no intention of eliciting the testimony about why the defendant married Liz Bonds. This
9 Court granted the defendant's motion to exclude both the grand jury testimony and Bell's
10 testimony. Exh. A at 3, 5. As the defense has failed to identify any additional testimony or
11 evidence which concerns the defendant's attitudes towards race, the United States is unable to
12 inform the Court whether it believes this evidence to be admissible, whether it intends to
13 introduce such evidence, or whether it intends to use such evidence in cross-examination as
14 appropriate.

15 **IV. The United States will comply with this Court's rulings**

16 The defendant wrongly accuses the United States of failing to conform its witness and
17 exhibit lists to this Court's evidentiary rulings, with respect to Agent Novitzky's and Bell's
18 testimony. As for the grand jury transcript, the version that is used at trial will assuredly reflect
19 all of the Court's evidentiary rulings.

20 This Court ordered that "Agent Novitzky may not opine on the truthfulness of
21 defendant's Grand Jury testimony" or "allude to or suggest the existence of the materials
22 excluded from evidence in this case," but "may, however, testify about the existence of
23 inconsistencies between defendant's testimony and other evidence before the Grand Jury" and
24 "how that impacted the Grand Jury investigation." Exh. A. at 7. The United States's witness list
25 description of Agent Novitzky's testimony conforms to this, explaining that Agent Novtizky will
26 testify "about the manner in which the defendant's false statements in the grand jury influenced
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1 the criminal investigation of Conte and Anderson.” Docket #276 at 6. To the extent that the
2 defendant takes issue with the prosecutors’ description of the statements as “false,” this does not
3 seem worth further briefing in an already heavily-litigated case. The description of the
4 statements as false is to pinpoint the statements at issue in the defendant’s grand jury testimony.
5 It does not reflect any intent to elicit testimony from Agent Novitzky about whether he personally
6 believed those statements to be false.

7 This Court has already decided that, with the exception of the “single domestic violence
8 incident” where the defendant choked Bell, Bell may testify about the “defendant’s
9 communications with and conduct” towards her, including “verbal harassment and threats,” and
10 “changes in defendant’s temperament and threats of violence.” Exh. A at 5-6, 9. Accordingly,
11 the United States’s witness list description of Bell’s anticipated testimony indicates that she will
12 “testify about changes in the defendant’s temperament, including an increase in angry,
13 threatening, controlling, and violent behavior.” Docket #276 at 2. The defendant argues that the
14 list is contrary to the Court’s order to the extent it includes “violent” behavior, evidently on the
15 ground that the Court excluded the defendant’s only violent behavior when it ruled the choking
16 incident inadmissible. In the United States’s view, however, the defendant engaged in other
17 behavior towards Bell, including threats of violence, which are appropriately described as
18 violent. While the United States does not intend to introduce evidence of the choking incident
19 unless the defense opens the door and the Court grants permission to do so, it does intend to
20 introduce evidence of the defendant’s other behavior towards Bell that it considers to be violent,
21 including threats of violence.

22 The United States intends to comply with all of this Court’s evidentiary rulings, including
23 its ruling that language from the defendant’s grand jury transcript and actual immunity order
24 regarding the defendant’s immunity from prosecution should not be presented to the jury. *See*
25 Exh. A at 3. The final redacted version of the defendant’s grand jury transcript, as it is either
26 read or presented to the jury, and immunity order, will reflect the Court’s evidentiary rulings.

27 **V. Pending motions**

28 The United States objects to the defendant using the opportunity this Court granted it to

1 raise new motions *in limine* in response to the United States’s revised witness and exhibit lists, to
2 supplement its briefing opposing the United States’s motion *in limine* (N) to admit evidence of
3 the defendant’s 2006 positive amphetamine test. As the United States has explained, the test is
4 relevant to whether the defendant knowingly lied when he told the grand jury that he was
5 unaware that he had been using performance-enhancing substances. The defendant told the
6 grand jury in 2003 that he would never have knowingly taken such substances. The fact that he
7 tested positive for performance-enhancing substances in 2006, after he was clearly aware that
8 substances he had taken might be performance-enhancing substances, casts doubt on his initial
9 claim to the grand jury. This Court reserved ruling on the matter pending submission of
10 additional materials by the United States that would establish the test’s admissibility. *See* Exh. A
11 at 10. The United States asks this Court to continue to defer its ruling until such time – if it
12 occurs – that the United States offers the test, whether in its case-in-chief, for impeachment
13 purposes, or in its rebuttal case.

14 With respect to the envelopes seized from Anderson’s house and photographs, the United
15 States is entitled to mark these as exhibits both for identification purposes (*e.g.*, to refresh
16 recollections of witnesses) and to submit them as evidence, since the Court has not excluded
17 them. As the United States asserted in prior briefing, both the envelopes and photographs are
18 admissible. *See* Docket #192. After the Court views the photographs, it will be able to
19 determine whether the photographs are admissible.

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