

1 ALLEN RUBY (SBN 47109)
SKADDEN, ARPS,
2 MEAGHER & FLOM, LLP
525 University Avenue, Ste. 1100
3 Palo Alto, CA 94301
Telephone: (650) 470-4500
4 Facsimile: (650) 470-4570

5 CRISTINA C. ARGUEDAS (SBN 87787)
TED W. CASSMAN (SBN 98932)
6 ARGUEDAS, CASSMAN & HEADLEY, LLP
803 Hearst Avenue
7 Berkeley, CA 94710
Telephone: (510) 845-3000
8 Facsimile: (510) 845-3003

9 DENNIS P. RIORDAN (SBN 69320)
DONALD M. HORGAN (SBN 121547)
10 RIORDAN & HORGAN
523 Octavia Street
11 San Francisco, CA 94102
Telephone: (415) 431-3472
12 Facsimile: (415) 552-2703

13 Attorneys for Defendant
BARRY LAMAR BONDS

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

18 UNITED STATES OF AMERICA,) Case No. CR 07 0732 SI
19)
20 Plaintiff,) **DEFENDANT’S MOTION**
) **TO EXCLUDE PURPORTED HOSKINS-**
21 vs.) **TING RECORDING**
)
22 BARRY LAMAR BONDS,) Date: April 5, 2011
) Time: TBA
23 Defendant.) Judge: The Honorable Susan Illston
)

24 **INTRODUCTION**

25 Steve Hoskins testified at trial that he attempted to secretly record a conversation with
26 Doctor Arthur Ting in 2003. (RT 460-461). He further testified that his attempt failed; that the
27 whereabouts of the recording were a “mystery” (RT 463); that he did not have the recorder he
28 used (id.); that no recording of the “tape” existed (RT 466); and that he had “no idea what

1 happened to the tape.” (RT 467) Hoskins now claims that the recording has miraculously
2 surfaced as the government prepares to rest its case

3 If the recording is indeed of a Hoskins-Ting conversation, it was made in an attempt to
4 extort Mr. Bonds after Bonds fired Hoskins in the spring of 2003. Hoskins’ conduct in making
5 a secret recording of a private conversation was criminal under both California and federal law.
6 In 2005, when Hoskins was attempting to avoid indictment for embezzling from Mr. Bonds,
7 Hoskins told federal investigators of the existence of the recording as a selling point for Hoskins’
8 own credibility. Apparently, he then realized its contents, consisting entirely of inadmissible
9 hearsay, contained nothing incriminating as to Mr. Bonds, so, when served with a subpoena for
10 the recording, Hoskins told the government that the recording had mysteriously disappeared. But
11 after Doctor Ting severely impeached Hoskins’ credibility last Thursday, however, Hoskins
12 decided the evidentiary phoenix must rise again.

13 Needless to say, troubling issues of authenticity surround a piece of evidence proffered
14 by a biased witness who violated his legal obligation to produce any such recording when it was
15 subpoenaed to the grand jury years ago . Were it necessary to consider the foundational and
16 authenticity issues raised by the recording’s sudden appearance, an evidentiary hearing would be
17 required after technical examination of the recording by the defense had been completed. But the
18 recording is inadmissible for numerous reasons that do not require extended factual inquiry,
19 among them that: Hoskins’ inexcusable delay in producing the recording deprived the defendant
20 of (a) his statutory right (and that of Doctor Ting) to move pretrial to suppress it as illegally
21 obtained and to exclude the recording on the grounds of all of its contents are inadmissible
22 hearsay, that those contents are irrelevant, and that they are far more prejudicial than probative;
23 (b) his right to address the recording in opening statement; and (3) his right to use the recording
24 in cross-examining Hoskins as proof of his bias and interest in planning to extort Mr. Bonds.

25 Of enormous importance, permitting the government to reopen its case and recall
26 Hoskins would constitute a reward for Hoskins’s bad faith and for what at a minimum is a lack
27 of investigative diligence on the prosecution’s part. The government would call Hoskins back to
28 the stand suggesting (as the press already has) that there has been a dramatic new development

1 in the case: marvelous new evidence has saved the government's day! The setting in which the
 2 recording would be presented would wholly obscure the fact that this recording contains not a
 3 word that can be considered for the truth asserted and proves nothing more than Hoskins's
 4 continuing efforts to manipulate these proceedings for his own purposes. The Court should
 5 exclude the recording and permit this trial to proceed to completion without further delay.

6 **I. THE DEFENSE HAS BEEN DEPRIVED OF ITS RIGHT TO MOVE PRETRIAL
 7 TO SUPPRESS AND/OR EXCLUDE THE RECORDING IN QUESTION**

8 The recording in question appears have been made during a medical examination of
 9 Hoskins after the Balco raid in 2003. Hoskins's admission that the recording was secret
 10 establishes that he committed a crime under California law, as Penal Code section 632 makes it a
 11 felony to record a confidential conversation without the consent of all parties involved.¹

12 Likewise, Title Three makes it a felony for a private party to record an oral
 13 communication with another party without the permission of that other party if "such
 14 communication is intercepted for the purpose of committing any criminal or tortious act in
 15 violation of the Constitution or laws of the United states or any State." 18 USC section
 16 2511(2)(d). Any "aggrieved person" in a trial may move to suppress evidence of an oral
 17 communication on the ground that it has been illegally obtained. 18 USC 2518(10) (a) (i). An
 18 aggrieved person is one who was party to an intercepted oral communication or a person against
 19 whom the interception was directed. 18 USC 2510 (11). The "aggrieved persons" who may seek

21
 22 ¹ Subsection (a) of section 632 of the California Penal Code provides in relevant part as
 follows:

23 Every person who, intentionally and without the consent of all parties to a
 24 confidential communication, by means of any electronic amplifying or recording
 25 device, eavesdrops upon or records the confidential communication, whether the
 26 communication is carried on among the parties in the presence of one another or
 27 by means of a telegraph, telephone, or other device, except a radio, shall be
 punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or
 imprisonment in the county jail not exceeding one year, or in the state prison, or
 by both that fine and imprisonment.

28 Cal. Pen. Code § 632 (2011).

1 suppression of illegally intercepted oral communications include trial witnesses. *Anthony v.*
2 *United States*, 667 F.2d 870, (10th Cir. 1981).

3 Indisputably, had Hoskins turned over the recording here in question to the government
4 as his grand jury subpoena required him to do, the government would have been obliged to put
5 that recording on its exhibit list and provide it to the defense prior trial for scientific testing.
6 Both Mr. Bonds and Doctor Ting would have had the statutory right to bring suppression
7 motions under Title Three. Admittedly, resolution of those motions would have involved
8 complex questions of law and fact, and Mr. Bonds does not intend to argue the merits of his
9 claim at this stage of the proceedings, nor is Doctor Ting present before the Court to do so. The
10 point here is that under the relevant statute, Mr. Bonds and Doctor Ting now would have the
11 right to litigate their suppression claims before the Court proceeded to consider other challenges
12 to the admissibility of the recording. See 18 USC section 2518 (10)(a) (“Such motion shall be
13 made before the trial, hearing, or proceeding unless there was no opportunity to make such
14 motion...”)

15 Furthermore, absent Hoskins’s efforts at manipulating these proceedings, further
16 challenges to the admissibility of the recording on hearsay, relevance, and 403 grounds should
17 have and would have been litigated by means of full briefing and oral argument during the
18 extensive rounds of in limine motions decided by the Court. As demonstrated below, the
19 contents of the recording are entirely inadmissible for the truth asserted, and any other
20 conceivable probative value of the recording is far outweighed by its prejudicial effect and the
21 consumption of time its introduction would consume. Whether the responsibility of the delay in
22 producing the recording lies entirely with Hoskins or is shared by the government, the burden on
23 the Court and jury if the Court were to further consider the recording’s admissibility would be
24 intolerable. The recording should be excluded on that ground alone.

25 **II THE RECORDING CONSISTS ENTIRELY OF INADMISSIBLE AND** 26 **PREJUDICIAL HEARSAY**

27 It is certainly beyond dispute that the recording constitutes hearsay, as it contains out of
28 court statements by Stevie Hoskins—perhaps ninety percent of the recording—and a few

1 substantive responses by Doctor Ting, along with a series of “ums,” “uhs,” “uh-huhs,” and
2 [unitelligibles] on Ting’s part, as, after initialling counseling Hoskins on medical issues, Ting
3 seems to be tending to other business as Hoskins engages in a long monologue. The subject of
4 that monologue is the raid on Balco conducted, according to Hoskins, the day before the medical
5 consultation.

6 The initial level of hearsay created by the out of court statements of Hoskins and Doctor
7 Ting is, however, the tip of the iceberg of inadmissibility. Much of Hoskin’s discursion concerns
8 what he had read in newspapers about the BALCO raid. This Court admonishes jurors every day
9 that they must never read a news account about this case or Balco, yet the government proposes
10 that those jurors hear Stevie’s fevered and exaggerated recounting of such newspaper accounts.
11 At one point in his speech, Hoskins appears to shovel three additional levels of hearsay into his
12 discourse, as he describes what his mother told him about what a female football player named
13 Smokey told her about what Victor Conte supposedly told Smokey. To the extent that anything
14 Doctor Ting says can be discerned on the recording, he also appears to be talking about various
15 things that have been told to him by others.

16 The recording does not impeach Doctor Ting’s testimony about what he did and did not
17 discuss with Hoskins. As noted, the recording is Hoskins’s speech about the Balco raid; it does
18 not contain any statements by Doctor Ting about Mr. Bonds’s alleged use of performance
19 enhancing drugs. Doctor Ting testified that he did not recall talking to Hoskins about steroids in
20 2003, but it is possible he did so. (RT 1504, 1527). The recording thus has little or now probative
21 value, and, needless to say, the prejudicial impact of the wholly inadmissible hearsay it contains
22 renders it plainly inadmissible under Rule 403. The delay in producing it only adds to that
23 conclusion. *Smith v. Ford Motor Co.*, 626 F.2d 784, 498 (10th Cir. 1980) (affirming exclusion of
24 expert testimony where pre-trial disclosure did not reveal substance of testimony, resulting in
25 surprise and prejudice to opposing party which continuance could not correct and which
26 disrupted trial)

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CONCLUSION

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For the reasons stated, the newly proffered Hoskins recording should be excluded from

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evidence.

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Dated: April 5, 2011

Respectfully submitted,

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ALLEN RUBY (SKADDEN, ARPS, ET AL.)

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ARGUEDAS, CASSMAN & HEADLEY, LLP

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RIORDAN & HORGAN

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By /s/ Dennis P. Riordan

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Dennis P. Riordan

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By /s/ Donald M. Horgan

15

Donald M. Horgan

16

Counsel for Defendant

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Barry Lamar Bonds

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