

1 ALLEN RUBY, SB #47109
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
2 525 University Avenue, Suite 1100
Palo Alto, CA 94301
3 Telephone: 650-470-4500
Facsimile: 650-470-4570

4 CRISTINA C. ARGUEDAS, SB #87787
5 TED W. CASSMAN, SB #98932
ARGUEDAS, CASSMAN & HEADLEY
6 803 Hearst Avenue
Berkeley, CA 94710
7 Telephone: 510-845-3000
Facsimile: 510-845-3003

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

12
13 Attorneys for Defendant
BARRY BONDS
14

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION
18

19	UNITED STATES OF AMERICA,	)	Case No.: CR 07-0732 SI
20)	
21	Plaintiffs,	)	DEFENDANT'S REPLY
22	vs.	)	MEMORANDUM OF POINTS AND
23	BARRY LAMAR BONDS,	)	AUTHORITIES IN FURTHER
24	Defendants	)	SUPPORT OF DEFENDANT'S REPLY
		)	MOTION TO REQUIRE
		)	GOVERNMENT TO PROVIDE
		)	INFORMATION ABOUT THE
		)	DECISION NOT TO PROSECUTE
		)	STEVEN HOSKINS

25 Date: January 21, 2011
26 Time: TBA
27 Judge: The Honorable Susan Illston
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE

I. INTRODUCTION1

II. ARGUMENT2

 A. HOSKINS' "TRUE ROLE IN THE INVESTIGATION AND TRIAL
 OF THE CASE" AGAINST MR. BONDS MUST BE FULLY
 EXPLORED.....2

 B. DOCUMENTS UNDERLYING THE DECISION NOT TO
 PROSECUTE HOSKINS ARE ESSENTIAL TO FULL AND FAIR
 CROSS-EXAMINATION IN LIGHT OF HOSKINS' GRAND
 JURY TESTIMONY.5

 C. NOTHING IN RULE 16 RELIEVES THE GOVERNMENT OF
 RESPONSIBILITY FOR FULLY DISCLOSING THE
 CIRCUMSTANCES OF ITS DECISION NOT TO PROSECUTE
 HOSKINS.7

III. CONCLUSION.....8

1 **TABLE OF AUTHORITIES**

2 PAGES

3
4 **Cases**

5 *Banks v. Dretke*, 540 U.S. 668 (2004) 2, 3
6 *Benn*, 283 F.3d at 1058 citing *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997)..... 5
7 *Brady v. Maryland*, 373 U.S. 83 (1963) 6
8 *Maxwell v. Roe*, 2010 WL 4925429..... 3
9 *United States v. Bagley*, 473 U.S. 667 (1985) 6

10 **Rules**

11 Federal Rules of Criminal Procedure, Rule 16(a)(2)..... 7, 8

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 The Government's Opposition to Defendant's Motion to Require the Government to Provide
3 Information About the Decision Not to Prosecute Steven Hoskins (the "Opposition") is curiously
4 devoid of content. It ignores the discovery actually sought by Mr. Bonds in order to complain
5 about a nonexistent "fishing expedition." Contrary to abundant Supreme Court and Ninth Circuit
6 authority, it suggests that the relationship between the Government and Hoskins isn't especially
7 important. It jeopardizes credibility with the remarkable assertion that "Hoskins did not receive
8 any benefit as a result of the [decision not to prosecute him]." Opposition, page 2, lines 20-21. As
9 discussed in detail below, the Opposition also overlooks the Grand Jury testimony of Hoskins.

10 Instead, the Opposition recites at least four times (the exact words differ, but only a little)
11 that "no deals or agreements were made with Hoskins by either the NDCA or the WDWA to
12 decline the prosecution in exchange for Hoskins' testimony in the prosecution of Barry Bonds ..."
13 Opposition, page 2, lines 2-5; page 2, lines 19-21; page 6, lines 7-8; page 6, lines 13-16. These
14 assertions are not supported by documentary evidence, by a declaration from anyone, nor even by
15 Hoskins' Grand Jury testimony. They are certainly inconsistent with the undisputed facts that after
16 Hoskins was told he wouldn't be prosecuted for embezzlement or other crimes, he provided the
17 Government with physical evidence, introduced prosecutors to his sister, who became a
18 Government witness, met with and spoke to the prosecution team numerous times, and testified for
19 the Government at the Grand Jury.

20 What the Opposition has done is really to highlight the need for full discovery of the
21 circumstances – communications among Government personnel, investigation (if any),
22 communications with Hoskins and his counsel – which accompanied the decision not to prosecute
23 him. The Opposition represents that the United States Attorney's Office for the Northern District
24 of California recused itself from any possible prosecution of Hoskins in 2003 (Opposition, page 1,
25 lines 25-26). In other words, the Government represents that from 2003 onward the Northern
26 District prosecutors had nothing to do with the "allegations of fraud against Hoskins." Yet now
27 these same prosecutors make representation after representation about how there were "no deals"
28 with Hoskins. How would they know? If they were recused, then they can't say why Hoskins

1 wasn't prosecuted. If they are in a position to know about the no-prosecution decision, then they
2 were not recused, which gives rise to more unanswered questions.

3 In the discussion that follows, Mr. Bonds will review the applicable law, which is clear
4 that – contrary to the Opposition – thorough cross examination of Hoskins and his arrangements
5 with the Government are fundamental to Mr. Bonds' right to a fair trial.

6 **II. ARGUMENT**

7 **A. HOSKINS' "TRUE ROLE IN THE INVESTIGATION AND TRIAL OF THE**
8 **CASE" AGAINST MR. BONDS MUST BE FULLY EXPLORED**

9 Hoskins is a Government informant. We know that he was promised (at least) forgiveness
10 from prosecution for serious crimes. In addition to the circumstantial evidence which already
11 connects this benefit to his enthusiastic cooperation in the prosecution of Mr. Bonds, a fair trial
12 requires all the evidence of how and why he received amnesty.

13 In *Banks v. Dretke*, 540 U.S. 668 (2004) the Supreme Court granted a habeas petition in
14 which the defendant alleged a *Brady* violation based on the government's failure to disclose that a
15 prosecution witness was a paid informant and was testifying under fear of prosecution. After the
16 defendant's conviction, the prosecution witness, Mr. Farr, said “I assumed that if I did not help
17 [Deputy Sherriff Huff] he would have me arrested for drug charges.” *Banks*, 540 U.S. at 701. The
18 Supreme Court addressed the issue as follows:

19 Had jurors known of Farr's continuing interest in obtaining Deputy
20 Sheriff Huff's favor, in addition to his receipt of funds to “set [Banks]
21 up,” *id.*, at 442, ¶ 7, they might well have distrusted Farr's testimony,
22 and, insofar as it was uncorroborated, disregarded it. The jury,
23 moreover, did not benefit from customary, truth-promoting
24 precautions that generally accompany the testimony of informants.
25 This Court has long recognized the “serious questions of credibility”
26 informers pose. *On Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct.
27 967, 96 L.Ed. 1270 (1952). *See also*, Trott, Words of Warning for
28 Prosecutors Using Criminals as Witnesses, 47 Hastings L.J. 1381,
1385 (1996) (“Jurors suspect [informants'] motives from the moment
they hear about them in a case, and they frequently disregard their
testimony altogether as highly untrustworthy and unreliable”).
We have therefore allowed defendants “broad latitude to probe
[informants'] credibility by cross-examination” and have counseled
submission of the credibility issue to the jury “with careful
instructions.” *On Lee*, 343 U.S., at 757, 72 S.Ct. 967; accord *Hoffa v.*
United States, 385 U.S. 293, 311-312, 87 S.Ct. 408, 17 L.Ed.2d 374
(1966). *See also*, 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury

1 Practice and Instructions, Criminal § 15.02 (5th ed.2000) (jury
2 instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and
3 Eleventh Circuits on special caution appropriate in assessing
informant testimony).

4 [...] [O]ne can hardly be confident that Banks received a fair trial,
5 given the jury's ignorance of Farr's true role in the investigation and
6 trial of the case. See *Kyles*, 514 U.S., at 434, 115 S.Ct. 1555. ("The
7 question is not whether the defendant would more likely than not
8 have received a different verdict with the evidence, but whether in its
9 absence he received a fair trial, understood as a trial resulting in a
10 verdict worthy of confidence.").

11 *Banks*, 540 U.S. at 701-703

12 To use the Supreme Court's own words, Hoskins "true role in the investigation and trial of
13 the case" must be revealed in order to assure that the jury can "benefit from customary, truth-
14 promoting precautions that generally accompany the testimony of informants." Moreover, if the
15 jurors know the full extent of Hoskins' continuing interest in obtaining the government's favor, they
16 might well distrust his testimony.

17 On November 30, 2010, the Ninth Circuit decided *Maxwell v. Roe*, ---F.3d---, 2010 WL
18 4925429 (9th Cir. Nov. 30, 2010), a case in which Bobby Maxwell sought Habeas relief for a *Brady*
19 violation based on the government's failure to disclose that a prosecution witness was given
20 beneficial treatment in the form of a reduced sentence, in exchange for his testimony. The Ninth
21 Circuit said the following:

22 In general, *Brady* requires prosecutors to disclose *any* benefits that
23 are given to a government informant, including any lenient treatment
24 for pending cases. See, e.g., *Giglio*, 405 U.S. at 150; *Iv. Lambert*,
25 283 F.3d 1040, 1057 (9th Cir. 2002). In *Benn*, we held that, among
26 other evidence withheld by the prosecution, the prosecution's failure
27 to disclose a subsequent deal—even where that deal resulted in
28 minimal benefit to the informant—prejudiced the defendant. *Benn*,
283 F.3d at 1057. "The undisclosed benefits that [the informant]
received added significantly to the benefits that were disclosed and
certainly would have 'cast a shadow' on [the informant's] credibility.
Thus, their suppression was material." *Id.* at 1058.

29 Maxwell, 2010 WL 492549, at *18

30 Hoskins' escape from prosecution is arguably a much greater benefit than a mere reduced
31 sentence, therefore, the details of such an agreement would similarly "cast a shadow on the
32

1 informant's credibility." Moreover, the importance of the informant's testimony magnifies the
2 materiality of impeachment information as demonstrated by the Ninth Circuit's analysis in Maxwell:

3 [The informant's] testimony is significant not just because of the
4 paucity of other evidence, but also because of the content of his
5 testimony. As this court and the Supreme Court have noted, the
6 importance of **'the defendant's own confession is probably the
7 most probative and damaging evidence that can be admitted
8 against him.'** " *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)
(quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968)
(White, J., dissenting); see also *Moore v. Czerniak*, 574 F.3d 1092
(9th Cir. 2009) (citing *Fulminante* and concluding that counsel's
failure to move to exclude the petitioner's confession was prejudicial)

9 Maxwell, 2010 WL 492549, at *17 (emphasis added)

10 The Government's witness list states that Hoskins will testify that Mr. Bonds confessed to
11 using steroids. Hoskins is a key witness because this testimony, if believed would likely be the
12 most damaging evidence that could be admitted against Bonds, therefore any information that tends
13 to impeach Hoskins is not only material, it is critical to the defense.

14 *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2004) involved a jailhouse informant who testified
15 that the defendant, Mr. Benn, had confessed to a murder while the two were incarcerated awaiting
16 trial. The informant was subsequently released from jail and during Mr. Benn's trial, the informant
17 was stopped for a traffic violation and arrested on outstanding warrants. In addition to the
18 outstanding warrants, the police submitted a new file to the prosecution seeking to charge the
19 informant with burglary, and the probation department sought an arrest warrant for a probation
20 violation. The prosecution arranged the informant's release without charges on the outstanding
21 warrants. Additionally, the prosecution declined to file burglary charges against the informant and
22 delayed the issuance of a probation violation warrant until after a verdict was reached in Mr.
23 Benn's trial. The Ninth Circuit stated the following:

24 The *Brady* rule requires prosecutors to disclose *any* benefits that are
25 given to a government informant, including any lenient treatment.
26 [...] We have explained the reason why information regarding
27 prosecution-provided benefits constitutes *Brady* material. In *Singh v.*
28 *Prunty*, 142 F.3d 1157 (9th Cir.1998), we stated: 'Disclosure of an
agreement to provide such benefits, as well as evidence of the
benefits them-selves, could have allowed the jury to reasonably
conclude that [the informant] had a motive other than altruism for

1 testifying on behalf of the State. Such a finding could have
2 substantially impeached [the informant's] credibility as a witness.'

3 *Benn.*, 283 F.3d at 1057.

4 On appeal, the government argued that the undisclosed impeachment evidence was
5 immaterial and cumulative because the defense had cross-examined the informant about his
6 reduced sentence and his immunity from arrest during the trial. The Ninth Circuit disagreed and
7 held as follows:

8 The state cannot satisfy its Brady obligation to disclose exculpatory
9 and impeachment evidence "by making some evidence available and
10 asserting that the rest would be cumulative. Rather, the state is
obligated to disclose all material information casting a shadow on a
government witness's credibility."

11 *Benn.*, 283 F.3d at 1058 citing *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997)

12 The same reasoning should apply in our case. The state cannot simply assert in a
13 conclusory fashion that its decision not to prosecute Hopkins was not part of a deal for his
14 testimony. The state is obligated to release all information casting a shadow on Hoskins' credibility,
15 including its files relating to the decision not to prosecute him.

16 **B. DOCUMENTS UNDERLYING THE DECISION NOT TO PROSECUTE**
17 **HOSKINS ARE ESSENTIAL TO FULL AND FAIR CROSS-EXAMINATION**
18 **IN LIGHT OF HOSKINS' GRAND JURY TESTIMONY.**

19 One of the cornerstones of the Opposition, repeated many times, is that the decision not to
20 prosecute Hoskins was based entirely upon the results of the investigation into allegations made by
21 Mr. Bonds. (This of course begs the question of how the "recused" prosecutors in the Northern
22 District have any knowledge of how and why the decision was made.) Hoskins testified to the
23 contrary at the Grand Jury:

24 Q. Okay. And after – after you left, did – did Barry Bonds
make a complaint about you to law enforcement?

25 A. Yes. He did.

26 Q. And what did he – what did he say?

27 A. He tried to make a complaint about some memorabilia
28 sales; that I took his – that I took some of his stuff and he
ain't authorizing me to take it. Anyway, they wouldn't

1 investigate it and found out he was lying just like he
2 always is.

3 Q. So the result was no charges, no nothing.

4 A. No charges, the case dropped and that was that.

5 Grand Jury testimony of Steven Hoskins, March 16, 2006, at pp. 91-92, emphasis added.

6 This testimony directly contradicts the representations in the Opposition:

7 Bonds made allegations of fraud against Hoskins in 2003 after a
8 falling out between the two men. The United States Attorney's
9 Office for the Northern District of California (the "NDCA")
10 recused itself from that matter in 2003, and the results of that
11 investigation were independently evaluated by the United States
12 Attorney's Office for the Western District of Washington (the
13 "WDWA").

14 Opposition, p. 1, lines 24-27 – 2, line 1, emphasis added.

15 And again:

16 The [materials disclosed in discovery] includes (sic) numerous
17 investigative reports regarding the investigation as a result of
18 Bonds' complaint to the FBI regarding Steve Hoskins.

19 Opposition, p. 3, lines 4-5.

20 And again:

21 This investigation began in 2003 when Bonds met with law
22 enforcement and claimed Hoskins, his former friend and
23 associate, had defrauded him out of sports memorabilia and funds
24 associated with Bonds' related sports memorabilia.

25 Opposition, p. 3, lines 6-8.

26 And again:

27 The government has already disclosed the underlying FBI
28 reports concerning the investigation that led to the declination.

29 Opposition, p. 6, lines 8-9.

30 It is fundamental that evidence which impeaches the credibility of a key prosecution
31 witness is exculpatory evidence which must be provided to the defense under *Brady v. Maryland*,
32 373 U.S. 83 (1963). See, for example, *United States v. Bagley*, 473 U.S. 667, 676 (1985):

33 Impeachment evidence ... as well as exculpatory evidence ...

1 falls within the Brady rule ... such evidence is 'evidence
2 favorable to an accused. ...'

3 Documents tending to show that the prosecution of Hoskins was declined because of the
4 results of an investigation directly impeach Hoskins' Grand Jury testimony that "they wouldn't
5 investigate it ..." Documents tending to show that prosecution was declined for any other reason
6 directly impeach Hoskins' Grand Jury testimony that law enforcement "found out [Mr. Bonds] was
7 lying just like he always is." An additional and independent issue under *Brady* arises from
8 documents tending to show that the declination was not based upon investigative results, but rather
9 was part of an express or implicit agreement to go easy on Hoskins if he supported the
10 Government's case against Mr. Bonds.

11 C. **NOTHING IN RULE 16 RELIEVES THE GOVERNMENT OF**
12 **RESPONSIBILITY FOR FULLY DISCLOSING THE CIRCUMSTANCES**
OF ITS DECISION NOT TO PROSECUTE HOSKINS.

13 The Opposition concedes that the work product provisions of Rule 16(a)(2) cannot trump
14 the constitutional requirements of *Brady*. Moreover, the Opposition does not assert that all
15 documents pertinent to its decision not to prosecute Hoskins fall within the language of Rule
16 16(a)(2).

17 Instead, the Opposition offers the vaguely worded assertion that "the internal memoranda
18 and communications underlying the decision to decline the prosecution are not discoverable under
19 the Federal Rules of Criminal Procedure." Opposition, p. 2, lines 16-18. This falls far short of the
20 specific requirements of §(a)(2):

21 Except as Rule 16(a)(1) provides otherwise, this Rule does not
22 authorize the discovery or inspection of reports, memoranda, or other
23 internal government documents made by an attorney for the
Government or other Government agent in connection with
investigating or prosecuting the case ..."

24 Fed. R. Crim. P. 16(a)(2)

25 Nowhere does the Opposition claim that all of the documents pertaining to nonprosecution
26 of Hoskins are "reports, memoranda, or other internal government documents made by an attorney
27 for the Government or other Government agent in connection with investigating or prosecuting the
28 case." So, for example, notes of communications between prosecutors and the attorney for Hoskins

1 cannot possibly fall within §(a)(2), nor would a communication from a case agent to a prosecutor
2 saying, in effect, "Hoskins wants to help us in the Bonds case, let's not file criminal charges against
3 him." As the Congressional notes from the adoption of Rule 16 explain, "a party may not avoid a
4 legitimate discovery request merely because something is labeled 'report,' 'memorandum,' or
5 'internal document.'" Fed. R. Crim. P. 16 Advisory Committee Notes.

6 The Court need not reach these issues because the documents in question are plainly
7 required by *Brady*. Apart from *Brady*, if there were a potential 16(a)(2) question, the Government
8 has not adequately nor unequivocally asserted that discoverable materials fall within the precise
9 language of the Rule.

10 **III. CONCLUSION**

11 For the reasons stated above, Mr. Bonds respectfully asks the Court for an order that the
12 Government promptly provide:

13 1. All investigation reports and other documents which formed the basis for the
14 decision not to prosecute Hoskins;

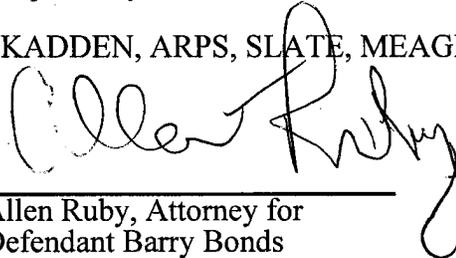
15 2. Any communications concerning Hoskins from investigators and attorneys in the
16 Northern District of California to law enforcement in the Western District of Washington or
17 elsewhere; and

18 3. Any information concerning the decision not to prosecute Hoskins.

19 Respectfully submitted,

20 DATED: January 14, 2010

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

21 
22 _____
23 Allen Ruby, Attorney for
24 Defendant Barry Bonds

25
26
27
28