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BARRY LAMAR BONDS

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

18 UNITED STATES OF AMERICA,
19 Plaintiff,
20 vs.
21 BARRY LAMAR BONDS,
22 Defendant.

) Case No. CR 07 0732 SI

) **DEFENDANT’S MOTION IN LIMINE**
) **FOUR: RE OPINION TESTIMONY AS**
) **TO THE TRUTH OR FALSITY OF**
) **DEFENDANT’S GRAND JURY**
) **TESTIMONY OR HIS STATE OF MIND**

) Date: March 1, 2011
) Time: 3:30 p.m.
) Courtroom of the Honorable Susan Illston

23
24 In its “Witness List,” filed on October 15, 2010, which also included brief descriptions of
25 the testimony the government intends to elicit from each of its witnesses, the following sentence
26 was included in the paragraph concerning Jeff Novitzky, the then-IRS agent who led the Balco
27 investigation: “He will also testify about the manner in which the defendant’s false statements to
28 the grand jury influenced the criminal investigation of Conte and Anderson.” (Witness List, at

1 page 5)

2 The prosecution has the burden of proving beyond a reasonable doubt not only that the
3 defendant's statements were knowingly false but also that they were material to the grand jury's
4 proceedings. As Mr. Bonds has demonstrated in prior briefing, the law clearly defines materiality
5 in objective terms: whether there is a logical connection between the object of a grand jury
6 investigation and the answer to a question put to a grand jury witness. *United States v.*
7 *McKenna*, 327 F.3d 830, 838 (9th Cir. 2003) (“[A] statement is material if it has a natural
8 tendency to influence, or was capable of influencing, the decision of the decision-making body to
9 which it was addressed.”). Mr. Bonds was informed of the nature of the investigation being
10 conducted by the grand jury before which he testified—i.e., an inquiry into whether Greg
11 Anderson and Victor Conte were distributing performance enhancing substances to athletes. It
12 will be the province of the jury to decide whether the answers Mr. Bonds gave to the questions
13 listed in the indictment were, as an objective matter, capable of influencing the inquiry the grand
14 jury was conducting.

15 Neither Mr. Novitsky nor any other prosecution witness, lay or expert, may, under the
16 guise of addressing the materiality issue, offer testimony that contains an explicit or implied
17 opinion as to whether any of Mr. Bonds' statements were true or false. “Under the Federal Rules,
18 opinion testimony on credibility is limited to character; all other opinions on credibility are for
19 the jurors themselves to form.” *United States v. Awkard*, 597 F.2d 667, 671 (9th Cir. 1979); *see*
20 *Maurer v. Department of Corrections*, 32 F.3d 1286, 1289 (8th Cir. 1994) (“[I]t is hornbook law
21 that opinion testimony as to the credibility of a particular statement is inadmissible and invades
22 the jury's exclusive province of determining the credibility and weight of any evidence.”). Thus,
23 in *United States v. Sanchez-Lima*, 161 F.3d 545 (9th Cir. 1998), the Ninth Circuit concluded that
24 it was reversible error to permit a Border Patrol Officer to testify over objection that “based on
25 his training and experience, Agent Kermes [a witness who testified before the jury] was telling
26 the truth” during his post incident interview. *Id.* at 548. *See also United States v. Binder*, 769
27 F.2d 595, 602 (9th Cir. 1985) (expert witness testimony that particular witnesses were truthful
28 was impermissible because “[i]t is the jurors' responsibility to determine credibility by assessing

1 the witnesses and witness testimony in light of their own experience”), *overruled on other*
2 *grounds* by *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997) (en banc); *United States v.*
3 *Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) (upholding exclusion of expert psychiatric testimony
4 that a witness was a sociopath who would lie, because “competency is for the judge, not the jury.
5 Credibility, however, is for the jury—the jury is the lie detector in the courtroom.”).

6 Lay testimony about whether other witnesses were telling the truth is also prohibited.
7 *United States v. Henke*, 222 F.3d 633, 643 (9th Cir. 2000) (per curiam). It is misconduct for a
8 prosecutor to elicit comments on the veracity of witnesses or the guilt of the defendant. *United*
9 *States v. Combs*, 379 F.3d 564, 572 (9th Cir.2004) (finding error where prosecutor asked
10 defendant to testify that government agent was lying); *United States v. Sanchez*, 176 F.3d 1214,
11 1219-20 (9th Cir. 1999) (error for a prosecutor to force a defendant to call a United States
12 marshal a liar); *see United States v. Moran*, 493 F.3d 1002, 1009 (9th Cir. 2007) (per curiam).

13 Other Circuits are in accord. *United States v. Sullivan*, 85 F.3d 743, 750 (1st Cir. 1996)
14 (“we state the rule now emphatically: counsel should not ask one witness to comment on the
15 veracity of the testimony of another witness;” “[i]t is not the place of one witness to draw
16 conclusions about, or cast aspersions upon another witness’ veracity.”); *United States v. Boyd*, 54
17 F.3d 868, 871 (D.C.Cir. 1995)(“It is [] error for a prosecutor to induce a witness to testify that
18 another witness, and in particular a government agent, has lied on the stand,” because it infringes
19 “on the jury’s right to make credibility determinations.”); *United States v. Richter*, 826 F.2d 206
20 (2d Cir. 1987) (“Determinations of credibility are for the jury . . . not for witnesses.”).

21 Indeed, testimony from a government agent that a particular witness’s statement or
22 testimony was or was not credible or sincere is so improper that it may violate a defendant’s
23 federal constitutional right to due process of law. *Maurer v. Dept. of Corrections* (8th Cir. 1994)
24 32 F.3d 1286, 1287 (denial of due process of law to admit testimony from witnesses, including
25 two police officers, labeling the victim as “sincere” in her claim of rape); *Cooper v. Sowders* (6th
26 Cir. 1988) 837 F.2d 284, 287-288 (officer improperly allowed to testify as an expert that there
27 was no evidence linking any other “suspects” to the murder which produced a “fundamentally
28 unfair” trial).

1 Thus Mr. Novitzky may not give testimony as to whether Mr. Bonds' answers to
2 questions before the grand jury were false, nor may he testify as to his opinion regarding what
3 "truthful" answers would have been, or how "truthful" answers would have affected the grand
4 jury's decisions. Nor may Novitzky be asked whether other evidence "contradicted" or
5 "disproved" or "supported" the defendant's statements. Any of those terms would be a shorthand
6 for giving the agent's opinion on the meaning of the evidence.

7 Furthermore, the government is prohibited from offering any testimony opining about
8 what Bonds "knew" or "must have known." Variants may include whether Bonds knew or must
9 have known that the substances he took were steroids, or whether Bonds knew or must have
10 known that the questions he was asked were material to the grand jury's investigation, or were
11 capable of influencing their decision on the BALCO investigation. Fed. R. Evid. 704(b) plainly
12 precludes expert testimony on whether a defendant had a particular mental state.

13 Further, lay opinion testimony is also prohibited. In *United States v. Henke*, 222 F.3d
14 633 (9th Cir. 2000) (per curiam), the Ninth Circuit overturned a conviction in which Judge
15 Walker had permitted testimony that a defendant "must have known" about a false reporting
16 scheme, which was essential to prove that the defendant made a knowingly false statement. *Id.* at
17 639-641. As the Court explained, under Federal Rule of Evidence 701, a lay witness's opinion is
18 admissible only when it is helpful to understanding the witness's testimony or to the
19 determination of a fact in issue. Thus, "[i]f the jury already has all the information upon which
20 the witness's opinion is based, the opinion is not admissible." *Id.* at 641. As the *Henke* Court
21 noted, "lay testimony generally is not helpful on matters that are essentially a jury question, such
22 as credibility issues." *Id.* at 642 (quoting Jack B. Weinstein & Margaret A. Berger, Weinstein's
23 Federal Evidence § 701.05 (2d ed. 2000)).

24 Other circuits have reached the same conclusion. In *United States v. Anderskow*, 88 F.3d
25 245 (3d Cir. 1996), the Court held that a witness's testimony that a defendant "must have
26 known" about the fraud was inadmissible because it failed to meet the helpfulness requirement of
27 Rule 701; the question of what the defendant must have known was for the jury to determine, and
28 permitting the witness to give his opinion about what the defendant must have known,

1 improperly turned the witness into a thirteenth juror. *Id.* at 251.; *see United States v. Rea*, 958
2 F.2d 1206, 1219 (2d Cir. 1992) (same). Again, as the Advisory Committee notes make clear, the
3 Rules 701 and 702 were meant to exclude opinions “which would merely tell the jury what result
4 to reach.” Fed. R. Evid. 704, Advisory Committee Note.

5 **CONCLUSION**

6 This Court has previously ruled that “the government cannot use the broad definition of
7 materiality in [*United States v. Gaudin*, 515 U.S. 506 (1995)] to bootstrap otherwise inadmissible
8 evidence into this case.” February 19, 2009 order (Dkt. 137) at 20-21. The government must be
9 barred from shoehorning into the record inadmissible opinion testimony on the truth or falsity of
10 Mr. Bonds’ statements under the guise of proving materiality.

11 Dated: February 14, 2011

Respectfully submitted,

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