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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 Plaintiff,)
20 vs.) **DEFENDANT’S MOTION IN LIMINE**
21 BARRY LAMAR BONDS,) **SIX TO EXCLUDE EVIDENCE AS**
22 Defendant.) **HEARSAY AND UNDER FRE 402 AND**
23) **403**
Date: March 17, 2011
Time: 11:00 a.m.
Courtroom of the Honorable Susan Illston

24 **INTRODUCTION**

25 At a hearing before the Court held on Tuesday, March 8th, counsel for defendant Bonds
26 asked the Court for leave to file an additional motion in limine. That request was prompted in
27 part by the fact that the government had filed amended lists of witnesses and exhibits that
28 included some evidentiary items never before proffered by the government and others that

1 previously had been excluded by the Court. The Court permitted the filing of such a motion on
2 the condition that it be limited in scope.

3 In compliance with that order, the defense below submits substantive briefing principally
4 on three issues concerning the admissibility of: (a) eleven recordings of telephone messages left
5 for Kim Bell by Mr. Bonds during the course of their nine year relationship between 1994 and
6 2003; (b) the alleged refusal of Mr. Anderson to answer questions concerning Mr. Bonds when
7 first interrogated by Agent Novitzky in September of 2003; and (c) any racially charged
8 testimony. Additionally, the defense enumerates below items included on the government's
9 amended witness or exhibit list which the Court has already ruled inadmissible, as well as those
10 issues which have been argued to the Court but are pending a ruling. Finally, given the Court's
11 preference for limited additional briefing, we are not including in this motion our continuing
12 objections to the documents contained in the government's marked exhibits that we believe are
13 inadmissible on relevance and foundational grounds.

14 **I. THE RECORDINGS OF THE TELEPHONE MESSAGES SHOULD BE**
15 **EXCLUDED UNDER FEDERAL RULES OF EVIDENCE 402 AND 403**

16 On March 7th, the government filed an amended exhibit list that for the first time included
17 recordings and transcripts of eleven voicemails purportedly left for Kim Bell by Mr. Bonds.
18 (Govt. Exs. 55-65) The government's amended witness list states that Ms. Bell will "testify
19 about changes in the defendant's temperament, including an increase in angry, threatening, and
20 violent behavior. Bell will also identify 11 voicemail messages where the defendant exhibited
21 such behavior, identified as government exhibits 55-65." (Govt. Witness List, at 2) At the
22 hearing held on March 8th, the government asserted that the addition of these items to the
23 prosecution's exhibit list was necessitated by the court's ruling that excluded on Rule 403
24 grounds evidence of the incident in which Ms. Bell claims that Mr. Bonds acted in a violent
25 manner towards her.

26 The government has offered no foundational information as to when during the nine years
27 of the Bonds-Bell relationship the messages may have been left on Ms. Bell's phone. The
28 messages are generally short. Nine of the messages reflect Mr. Bonds irritation, expressed in

1 profane language, because he cannot locate Ms. Bell. A tenth cautions Ms. Bell not to “be doing
2 nothing you ain’t supposed to be.” The eleventh, concerning a check sent by Mr. Bonds to Ms.
3 Bell, is affectionate in tone, advises Ms. Bell to pay her first and last month’s rent, pay her taxes,
4 contains sexual references, and ends “true friends take care of true friends. Peace, I’m outta
5 here.”

6 The recordings should be excluded under Rule 402 as irrelevant and under Rule 403 as
7 far more prejudicial than probative and an utter waste of the Court’s time. The defense certainly
8 does not dispute the admissibility (as opposed to the truth) of testimony by Ms. Bell that she
9 either saw Mr. Bonds use PEDs or heard him admit to such use. Indisputably, the recordings
10 contain no reference whatsoever to PEDs.

11 The government’s theory of relevance appears to be that the language on the recordings,
12 to the extent that it is “angry, threatening, or controlling,” can be deemed symptomatic of the use
13 of PEDs. The claim of relevance must fail on a lack of foundation. However lamentable the fact
14 may be, the use of profane and angry language between paramours is an everyday occurrence.
15 Whatever the strength or weakness of the proposition that steroids cause physical changes in the
16 body, no honest or competent expert can testify that there is a scientific basis for the conclusion
17 that use of language such as that on the recordings is associated, much less caused, by steroid
18 use. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) (“[I]n order to
19 qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific
20 method. Proposed testimony must be supported by appropriate validation — *i.e.*, “good
21 grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to
22 ‘scientific knowledge’ establishes a standard of evidentiary reliability.”) Absent a scientifically
23 established link between the language in question and steroid use, the recordings and any
24 testimony by Ms. Bell concerning them are irrelevant and inadmissible under FRE 402.

25 Even if there were some minimal probative value to be gleaned from the recordings, that
26 value is far outweighed by the prejudicial effect and undue consumption of time the evidence
27 will have on this trial. As the government well knows, there were over one hundred voicemails
28 recorded and preserved by Ms. Bell. The government desires that the jury base its conclusions

1 about the Bonds-Bell relationship by presenting to the jury a tiny fraction of these. Obviously,
2 the defense will be entitled to put all of the remaining recordings into evidence to demonstrate
3 that the government's cross-section wholly distorts the true nature of the relationship.

4 But the appropriate rebuttal of the recordings will hardly stop there. The government's
5 contention is that the possessive and jealous tenor of the recordings it seeks to offer can be
6 attributed to steroid use. Needless to say, if the recordings are offered, the defense will have a
7 statutory and constitutional right to offer evidence that the cause of any emotionally fraught
8 language on the recordings was not due in any way to the use of PEDs, but to highly personal
9 elements of Mr. Bonds' relationship with Ms. Bell.

10 As stated in earlier pleadings, the defense maintains that sexual matters have nothing to
11 do with the charges against Mr. Bonds, and that all testimony dealing with such matters should
12 be declared off limits by both parties. But it is nonsense for the government to claim the right to
13 argue that the nature of Mr. Bonds's emotional relationship with Ms. Bell was attributable to
14 steroids, yet insist that wholly reliable defense evidence proving the contrary be excluded to save
15 Ms. Bell from embarrassment. *Olden v. Kentucky* 488 U.S. 227, 230-31 (1988) (Relevant
16 evidence concerning a witness's sexual history tending to show that witness had a motive to lie
17 cannot be excluded on ground "its probative value [was] outweighed by its possibility for
18 prejudice.") That is all the more true when it is the government that seeks to spend a good deal
19 of its case in chief on the defendant's sexual performance.

20 The voicemail evidence should be excluded under Rules 402 and 403.

21 **II. ANY TESTIMONY CONCERNING WHETHER GREG ANDERSON REFUSED**
22 **TO DISCUSS MR. BONDS WHEN INTERROGATED BY AGENT NOVITZKY**
23 **MUST BE EXCLUDED AS HEARSAY INADMISSIBLE UNDER THE**
24 **CONFRONTATION CLAUSE**

25 Agent Novitzky's reports indicate that when his team raided the home of Greg Anderson
26 in 2003, he interrogated Anderson on the issue of his distribution of PEDs to various athletes.
27 According to Novitzky, Anderson discussed his dealings with other athletes but refused to do so
28 when asked about Mr. Bonds.

If Mr. Anderson had made a statement concerning Mr. Bonds during an investigative

1 interrogation, it obviously would be inadmissible both as hearsay and as violative of Mr. Bonds’
2 confrontation clause rights under *Crawford v. Washington* (2004) 541 U.S. 36. But Anderson
3 made no verbal statement. If Anderson’s out of court silence were to be considered a statement,
4 that statement would be equally inadmissible, as silence is a form of assertive nonverbal conduct
5 which is included in the definition of hearsay. *See* Fed. R. Evid. 801(a)(2) and (c); *see also*
6 *McCormick on Evidence* § 264 (discussing the doctrine of “admissions by silence” as hearsay).

7 **III. ANY TESTIMONY CONCERNING RACIAL ATTITUDES IS INADMISSIBLE**

8 The government should be prohibited from offering any testimony concerning the subject
9 of race or Mr. Bonds’ attitudes on racial matters. Such evidence would be utterly irrelevant and
10 indisputably prejudicial. “The only purpose this evidence could serve would be to prejudice the
11 jury against” the defendant. *United States v. Kallin*, 50 F.3d 689, at 696 n.7 (9th Cir. 1995); *see*
12 *also United States v. James*, 109 F.3d 709, 713 (9th Cir. 1998) (admission of evidence of racial
13 attitudes would have “risked misleading and confusing the jury because of the provocative nature
14 of the topic”).

15 **IV. THE GOVERNMENT HAS INCLUDED ON ITS WITNESS AND EXHIBIT LIST 16 EVIDENCE THAT THE COURT HAS PREVIOUSLY RULED INADMISSIBLE**

17 **A. The Novitzky Testimony**

18 The government’s amended witness list continues to state that Novitzky “will also testify
19 about the manner in which the defendant’s false statements in the grand jury influenced the
20 criminal investigation of Conte and Anderson.” The Court has ruled out any testimony by
21 Novitzky concerning the “defendant’s false statements.” As the defense understands the Court’s
22 rulings, Novitzky may testify as to the investigative actions taken as a result of Mr. Bonds’s
23 testimony, but Novitzky may not testify to his mental impressions so as to suggest in any way his
24 opinion as to whether the testimony was untruthful.

25 **B. “Violent Behavior”**

26 The discovery provided to the defense contained Ms. Bell’s allegation that on a single
27 occasion Mr. Bonds acted towards her in a violent manner. The Court has excluded testimony
28 concerning that single incident. The government’s amended witness list, however, states that Ms.

1 Bell will “testify about changes in the defendant’s temperament, including an increase ... in
2 *violent* behavior.” (Italics added) This is the same language that was in the government’s
3 description of Ms. Bell’s testimony *before* the court’s exclusionary ruling. This may be an
4 oversight on the government’s part, but the defense wishes to confirm that no surprise testimony
5 concerning purported acts of domestic violence will be offered by the government.

6 C. The Immunity Order

7 Government’s Exhibit 38 is the order granting Mr. Bonds immunity as to his grand jury
8 testimony. It still contains the sentence: “In the judgment of the government Barry Bonds is
9 likely to refuse to testify...” The Court previously ordered that sentence struck from the order.

10 V. PENDING MOTIONS

11 The Court has pending before it challenges to the admissibility of (1) envelopes seized
12 from Mr. Anderson’s house that purportedly contained cash and were marked with handwriting
13 on the outside (Gov’t Exh. No. 12); and (2) photographs that may depict evidence that the Court
14 has excluded (Gov’t Exh. Nos. 26 and 28 – 32). (See transcript of January 21, 2011, hearing
15 (Dkt. 202) at 17-18.)

16 The third and most important pending issue involves defendant’s motion to exclude
17 evidence of his purportedly positive test result on the 2006 Major League Baseball amphetamine
18 test.

19 As a preliminary matter, defendant notes that the government still has failed to identify
20 witnesses to establish a foundation for admission of the test and has likewise failed to proffer
21 expert testimony concerning it. The test can be excluded on that basis of that failure alone.

22 As a substantive matter, moreover, the evidence is simply irrelevant under Fed. R. Evid.
23 401. Any relevance that it might have is derived from an unvarnished character inference, and
24 would thus violate Rule 404 and Rule 403. When evidence of a defendant’s other bad acts are
25 offered to show his knowledge, “the government must prove a logical connection between the
26 knowledge gained as a result of the commission of the prior act and the knowledge at issue in the
27 charged act.” *United States v. Mayans*, 17 F.3d 1174, 1181-82 (9th Cir. 1994). There is simply
28 no plausible theory that Mr. Bonds’s *subsequent* use of amphetamines somehow allowed him to

1 gain knowledge retroactively concerning different substances.

2 Moreover, even where the government's proffered "other acts" evidence involves prior
3 incidents with the same drug, courts require a high degree of similarity between the charged act
4 and the other act to justify admission. *See United States v. Mejia-Uribe*, 75 F.3d 395 (8th Cir.
5 1996) (holding that evidence of a prior cocaine conviction could not be admitted to show
6 knowledge in a current cocaine charge because the two incidents "were not similar in kind or
7 reasonably close in time"); *United States v. Arias-Montoya*, 967 F.2d 708, 710-12 (1st Cir. 1992)
8 (same). The Ninth Circuit has even held that evidence of a defendant's *contemporaneous* other
9 act of methamphetamine possession cannot be used to prove knowledge and intent in a
10 methamphetamine manufacturing charge. *United States v. Vizcarra-Martinez*, 66 F.3d 1006,
11 1013-14 (9th Cir. 1994). A fortiori, subsequent use of a different drug cannot be used to prove
12 prior knowledge in an entirely separate incident. Under this line of precedent, the government's
13 evidence here is flatly inadmissible under Rule 404.

14 Furthermore, admission of the amphetamine test would necessarily produce a distracting
15 mini-trial. The evidence of the subsequent amphetamine use would only be relevant under Ninth
16 Circuit law if the government could prove that the amphetamine use was *knowing*, *United States*
17 *v. Rendon-Duarte*, 490 F.3d 1142, 1145 (9th Cir. 2007), so the government would be required to
18 prove that the 2006 test resulted from knowing use. (It has proffered absolutely no evidence that
19 would carry its burden in that respect.) Thus, if the evidence were admitted, it would require
20 extensive submission of evidence on both (a) the validity of the amphetamine test, and (b) the
21 question of whether that supposed amphetamine use was knowing. Such a mini-trial would

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1 require a substantial amount of time and would distract the jury from the actual issues it will be
2 called to decide. The evidence is therefore inadmissible under Rule 403 as well.

3 Dated: March 11, 2011

Respectfully submitted,

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