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GREG FRANCIS ANDERSON

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

BARRY LAMAR BONDS,

Defendant.

In re Trial Subpoena of

GREG FRANCIS ANDERSON.

Case No.: CR 07-0732 SI

Trial Date: March 21, 2011

Time: 8:30 a.m.

Place: Courtroom 10

Honorable Susan Ilston

**MOTION TO DETERMINE THAT
FURTHER CUSTODIAL SANCTIONS
WOULD BE PUNITIVE RATHER
THAN COERCIVE**

Date: March 22, 2011

Time: 11:00 a.m.

Place: Courtroom 10

Honorable Susan Ilston

INTRODUCTION

With great respect to this Court, Greg Anderson presents himself in accord with this Court's Order made on March 2, 2011. In that proceeding, through counsel, Mr. Anderson advised this Court he would not testify. Mr. Anderson's position remains the same.

1 To date, Mr. Anderson has spent almost 1 year, 6 months and 2 weeks
2 imprisoned and restrained.

3
4 **ARGUMENT**

5 **I. MR. ANDERSON HAS “JUST CAUSE” BECAUSE THE SUBPOENA
6 VIOLATES THE PLEA AGREEMENT IN *UNITED STATES V. GREG
ANDERSON*.**

7 Civil Contempt proceedings are governed by 28 U.S.C. § 1826. 28 U.S.C. §
8 1826 provides:

9 Whenever a witness in any proceeding before or ancillary
10 to any court or grand jury of the United States refuses
11 *without just cause shown* to comply with an order of the
12 court to testify or provide other information, including any
13 book, paper, document, record, recording or other material,
14 the court, upon such refusal, or when such refusal is duly
brought to its attention, may summarily order his
confinement at a suitable place until such time as the
witness is willing to give such testimony or provide such
information. No period of confinement shall exceed the life

- of –
15 (1) the court proceeding, or
16 (2) the term of the grand jury, including extensions,
before which such refusal to comply with the court
17 order occurred, but in no event shall the confinement
18 exceed eighteen months.

19 28 U.S.C. § 1826 (emphasis added).

20 The Government’s violation of the plea agreement in *United States v.*
21 *Anderson*, Case No. CR 04-0440 SI provides witness of Anderson’s just cause.
22 This Court accepted Mr. Anderson’s plea in that case on July 15, 2005. Thereafter
23 on October 18, 2005, this Court sentenced Mr. Anderson to serve 3 months in
24 prison and 3 months home confinement. The Presentence Report made clear that
25 Mr. Anderson would not “cooperate” with the Prosecution.

26 In the BALCO case, the very prosecutors who now prosecute Mr. Bonds
27 proffered various plea agreements to Mr. Anderson’s then attorney, J. Tony Serra.
28 The various plea agreements asked that Mr. Anderson identify various athletes by
name. Mr. Serra told these very prosecutors that Mr. Anderson would not identify
anyone, ever.

1 Thereafter the Government relented. The Government changed the plea
2 agreement and deleted identification of any individuals. Further the Government
3 conveyed to Mr. Serra that Mr. Anderson's acceptance of the revised plea
4 agreement would conclude his involvement in the BALCO prosecution.

5 Mr. Anderson relied on the Government's representations to his attorney.
6 Mr. Anderson "accepted" a plea deal based upon his belief that in so doing, his
7 involvement in the BALCO case ended.

8 Mr. Anderson's reliance on the Government's representations, to his then
9 attorney, was foreseeable. Mr. Anderson's belief that his plea deal ended his
10 involvement was also reasonable.

11 The Government specifically misrepresented to Mr. Anderson what they
12 intended to do. That is not right. The Government's misleading and disingenuous
13 actions towards Mr. Anderson provides him with "just cause".

14 The United States Supreme Court has ruled on the way in which a plea
15 bargain, specifically prosecutorial violation of a plea bargain, should be dealt with.
16 In *Santobello v. New York*, 404 U.S. 257 (1971), the Court examined a case in
17 which a defendant negotiated with prosecutors to plead guilty to a lesser included
18 offense, in exchange for the prosecutor's agreement to make no recommendation
19 as to the sentence to be imposed. The plea was accepted by the court, but at trial, a
20 new prosecuting attorney appeared and recommended the maximum sentence. The
21 Supreme Court first noted the value inherent in the plea bargain process, before
22 stating,

23 This phase of the process of criminal justice, and the
24 adjudicative element inherent in accepting a plea of guilty,
25 must be attended by safeguards to insure the defendant
26 what is reasonably due in the circumstances. The
27 circumstances will vary, but a constant factor is that when
28 a plea rests in any significant degree on a promise or
agreement of the prosecutor, so that it can be said to be part
of the inducement or consideration, such promise must be
fulfilled.

Id. at 262. *Santobello* was remanded for reconsideration in light of the agreement.

In the instant case, Mr. Anderson entered into the plea agreement for the sole

1 reason that he believed it would be the end of it all for him. Mr. Anderson knew at
2 the time that he entered his plea that he would most probably be sentenced to
3 prison. And in fact, Mr. Anderson was sentenced to prison. Mr. Anderson served
4 3 months in Atwater Penitentiary and 3 months home confinement. Mr. Anderson
5 also knew when he entered the plea that he would not at any time have to identify
6 athletes. He gave the Government their pleas and served his time with the
7 expectation that at no time would the Government ever again ask him about
8 specific athletes.

9 The United States Attorney's Office knows this. Anderson's motivation is
10 evidenced by the plea agreements drafted by the prosecution that he rejected. The
11 Prosecutors cannot now claim otherwise.

12 Anderson also received such a guarantee from his defense counsel, J. Tony
13 Serra. Mr. Serra made clear to the Government that Anderson would never
14 cooperate with the Government at any time. It was when the Government relented
15 on the identification of athletes that Anderson agreed to enter the plea bargain.
16 The surrounding circumstances demonstrate that Mr. Anderson was solely
17 concerned with putting an end to his involvement in the situations and he
18 reasonably believed and understood that this was the case when he accepted the
19 plea agreement. The defendant's understanding at the time of the plea controls.
20 *United States v. Anderson*, 970 F. 2d 602, 607 (9th Cir. 1992).

21 The Court of Appeals for the Ninth Circuit has confronted a remarkably
22 similar case in *United States v. Singleton*, 1995 U.S. App. LEXIS 3302 (9th Cir.
23 1995). In keeping with the guidelines of *Santobello*, the Court found that the
24 agreement provided just cause and precluded the Government from compelling the
25 testimony of the witness. *Singleton* is a Rule 36-3 case. A copy of the case is
26 attached hereto. The case is relevant because it bears a striking resemblance to the
27 instant case. In *Singleton*, just as in the instant case, the defendant refused to
28 testify before a grand jury because of the plea agreement he had previously entered
into with the United States Attorney's Office.

1 The defendant in *Singleton* said that the plea agreement and evidence in the
2 form of preliminary negotiations and offers rejected by the defendant demonstrated
3 his motivation that his plea was predicated on the fact that he not be required to
4 cooperate in any form. The *Singleton* court found that, “If the Government were
5 allowed to issue the grand jury subpoena to Singleton and hold him in contempt for
6 refusing to testify, [he] would not get the full benefit of the bargain.” *Id.* at 11.
7 The import of *Singleton* is not the holding per se, but the fact that the Northern
8 District United States Attorney’s Office was put on notice that what they did to
9 Singleton was not acceptable.

10 The *Singleton* Court wrote:

11 The Government warns that acceptance of the district
12 court’s holding would result in a per se prohibition against
13 issuing grand jury subpoenas to any defendant who
14 declines to voluntarily cooperate with a federal criminal
15 investigation. Such a prohibition can be avoided if the
16 Government clearly discloses at the outset of plea
17 negotiations that refusal to cooperate with the Government
18 does not guarantee immunity from grand jury subpoenas.
19 Furthermore, the Government should disclose that if the
20 defendant refuses to answer a grand jury subpoena, he may
21 be found in contempt and may have to serve a longer
22 sentence than bargained for in the plea agreement. Such
23 clarification will assist the defendant in making a more
24 accurate decision and can lead to a stable plea agreement
25 that reflects the understanding of both parties.

19 *Id.* at 11.

20 The United States Government is an institutional litigant. The United States
21 Government and this United States Attorney’s Office is on notice that what they
22 did to Anderson herein is an unacceptable practice. As the drafter of the
23 agreement, in light of their prior experience in the *Singleton* case, they cannot now
24 complain. As stated in *United States v. Garcia*, 956 F.2d 41, 44 (4th Cir. 1992),
25 “courts ought not rigidly apply commercial contract law to all disputes concerning
26 plea agreements.” The Government made a representation to Anderson. If the
27 Government should now claim otherwise or attempt to interpose commercial
28 contract law or some twisted theory to justify their outrageous behavior Anderson
is denied a benefit that was an important basis – the most important basis – for his

1 decision to accept the plea agreement.

2 The Government was and is on notice per the discussion within *Singleton*
3 that they cannot extract a plea agreement in which the defendant believes that he
4 cannot be compelled to cooperate and thereafter subpoena him to testify in a case.
5 The terms of Anderson's plea agreement, as supplemented by parol evidence
6 restricts the Government from compelling Anderson's testimony. Therefore,
7 Anderson cannot be held in contempt for his refusal to comply with the subpoena.

8 Having pled guilty to two felonies, having served 3 months in Atwater
9 Federal Penitentiary and thereafter having served 3 months home confinement,
10 having registered as a drug offender, having provided his DNA sample, and having
11 been subjected to endless public ridicule, Mr. Anderson simply asks that the
12 Government be held to their end of the bargain. Anderson did all that and then
13 some to end his involvement in BALCO. The foregoing constitutes just cause.
14 Under these circumstances Mr. Anderson is not a contemnor.

15 **II. FURTHER IMPRISONMENT WILL NOT COMPEL MR.**
16 **ANDERSON TO TESTIFY.**

17 As noted above, Mr. Anderson has been restrained and imprisoned for more
18 than 18 months. To justify imprisonment of a civil contemnor it must be shown
19 that incarceration will serve a coercive purpose. Based on past events, history
20 establishes that jailing Greg Anderson will not compel him to testify.

21 A civil contemnor may not be jailed for longer than 18 months. 28 U.S.C. §
22 1826. 28 U.S.C. § 1826 is Congress's legislative acceptance of the restraint
23 imposed by the United States Supreme Court in *Shillitani v. United States*, 384
24 U.S. 364 (1966), limiting the power of federal judges to jail recalcitrant witnesses.

25 Although the longest period of time a civil contemnor can be jailed by law is
26 18 months, Section 1826 does not require a judge to imprison a recalcitrant
27 witness for 18 months. A judge may summarily imprison a recalcitrant witness
28 until the witness testifies or for the life of the court proceedings, but in no event

1 longer than “eighteen months”. 28 U.S.C. § 1826; *Shillitani, supra*, 384 U.S. at
2 364.

3 A civil contempt sanction is a coercive device imposed to secure compliance
4 with a court order. *Shillitani, supra*, 384 U.S. at 368. “At the least, due process
5 requires that the nature and the duration of commitment bear some reasonable
6 relation to the purpose for which the individual is committed.” *Jackson v. Indiana*,
7 406 U.S. 715, 738 (1972). When it becomes obvious that civil contempt sanctions
8 are not going to compel compliance, they lose their remedial characteristics.
9 *Soobzokov v. CBS*, 642 F.2d 28 (2d Cir. 1981). When civil confinement has lost its
10 coercive effect and “consequently no longer bears a reasonable relationship to the
11 purpose for which the contemnor was committed, due process requires that he be
12 released.” *In re Grand Jury Investigation*, 600 F.2d 420, 424-25 (3d Cir. 1979).

13 Section 1826 was partly enacted to ensure that civil contempt power is not
14 abused by administering it to punish an “intractable witness beyond that point
15 where it becomes evident that his testimony cannot be coerced through further
16 confinement.” *Id.* at 427. “Since criminal penalties may not be imposed in civil
17 contempt proceedings, the contemnor must be released when the incarceration has
18 lost its coercive force.” *Matter of Fed. Grand Jury February 1987 Term (Griffin)*,
19 677 F.Supp. 26, 28 (D. Me. 1988). The purpose of incarcerating a civil contemnor
20 is to compel them to do something. The purpose is coercive. But if the person will
21 not be coerced then the civil contempt should be ended. *Shillitani, supra*, 384 U.S.
at 371.

22 The court’s inquiry as to whether civil contempt has lost its coercive impact
23 must be conducted on an individualized basis “rather than application of a policy
24 that the maximum eighteen month term must be served by all recalcitrant
25 witnesses.” *Griffin, supra*, 677 F.Supp. at 28. It is a judge’s obligation not to jail a
26 civil contemnor when it becomes clear that the incarceration is no longer coercive.
27 *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983). It is obvious in the present
28 case that civil contempt has lost its coercive purpose and has instead evolved into a

1 punitive device. *Griffin, supra*, 677 F.Supp. at 28. Mr. Anderson has had 7 years
2 and 6 months to talk and he has steadfastly refused.

3 The reason why a recalcitrant witness is recalcitrant is not the determinative
4 factor in deciding whether imprisonment would be punitive rather than coercive.
5 The focus of the inquiry is whether there is a realistic possibility that
6 imprisonment might cause the contemnor to testify. *Id.* The burden lies on the
7 witness to demonstrate that there is no “realistic possibility” that continued
8 confinement may cause the witness to testify. *Griffin, supra*, 677 F.Supp. at 28.
9 “[As long as] the judge is persuaded, after a conscientious consideration of the
10 circumstances pertinent to the individual contemnor, that the contempt power has
11 ceased to have a coercive effect, the civil contempt remedy should be ended.”
12 *Simkin, supra*, 715 F.2d at 37.

13 Mr. Anderson has more than met this burden by his conduct. Mr. Anderson
14 has already been willing to miss events that are sacred to many and that would
15 have a compelling effect on most. Through it all, Mr. Anderson has remained
16 dedicated to his principles and maintains his silence. The proceedings against Mr.
17 Bonds are expected to last approximately 2 weeks. There are no changed
18 circumstances to indicate that the threat of 2 weeks of civil contempt will actually
19 have any coercive effect which would compel Mr. Anderson to testify. Rather, 2
20 weeks of incarceration will be a walk in the park for Mr. Anderson compared to the
21 over 18 months he has served thus far. Common sense should prevail here. Mr.
22 Anderson should not be imprisoned for the Bonds trial.

23 Furthermore, Jack Trimarco, a retired Federal Bureau of Investigations
24 (“FBI”) profiler and an expert in the areas of Polygraph Examination, Hostage
25 Negotiation, Psychological Profiling, and Interrogation has opined that based on
26 his training and experience, Mr. Anderson will not testify in any proceeding related
27 to the BALCO prosecution and that incarceration of Mr. Anderson would prove to
28 be a futile measure, as further jail time would not have any coercive effect on his
decision to testify. *See Declaration of Jack Trimarco*, ¶ 12.



LEXSEE 1995 U.S. APP. LEXIS 3302

UNITED STATES of AMERICA, Plaintiff-Appellant, v. HENRY E. SINGLETON, Defendant-Appellee.

No. 94-10474

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1995 U.S. App. LEXIS 3302

**January 12, 1995, Argued and Submitted, San Francisco, California
February 16, 1995, FILED**

NOTICE: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *47 F.3d 1177, 1995 U.S. App. LEXIS 19401.*

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CR-91-00537-FMS. Fern M. Smith, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellant: William P. Schaefer, AUSA, USSF - OFFICE OF THE U.S. ATTORNEY, San Francisco, CA.

For HENRY E. SINGLETON, Defendant - Appellee: David A. Nickerson, Esq., Sausalito, CA.

JUDGES: Before ALDISERT, " CHOY and SCHROEDER, Circuit Judges.

** The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

OPINION

MEMORANDUM

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

The United States of America ("Government") appeals the district court's denial of the Government's motion, pursuant to *28 U.S.C. § 1826*, for an order of civil contempt directed at Henry E. Singleton ("Singleton") for his refusal to comply with a grand jury subpoena. Having jurisdiction under *28 U.S.C. § 1291*, [*2] we affirm the district court's decision.

I

1995 U.S. App. LEXIS 3302, *

On January 28, 1992, Singleton was indicted for various drug offenses including conspiracy to distribute heroin. During pretrial proceedings, Singleton, represented by Tony Serra, Esq., refused to consider any plea offer that included a *United States Sentencing Guidelines* § 5K1.1 provision contemplating Singleton's assistance to the Government. The Government offered various plea agreements, including one with a fifteen-year minimum period of incarceration but without a § 5K1.1 provision. Singleton rejected all Government offers, and the case proceeded to trial. All Government plea offers became void at that time.

On September 14, 1992, jury selection commenced. On the same day, the Government filed an Allegation of Prior Conviction, informing Singleton that he would face enhanced penalties of a minimum mandatory of twenty-five years if convicted. The Government contends that three days later, Singleton reinitiated negotiations for a plea agreement. Singleton counters, however, that the Government reinitiated plea negotiations by dropping its demand that any plea agreement include cooperation.

The second set of plea negotiations took [*3] place in the district court's chambers, where the presiding judge had an opportunity to listen to the discussion between the prosecutor and Mr. Serra. On the basis of that conversation, the district court found that Singleton had a firm position that he was not going to cooperate with the Government in any manner.

The negotiations resulted in a written plea agreement executed on September 17, 1992. In exchange for a plea of guilty, Singleton received certain concessions from the Government, including mandatory minimums, Sentencing Guideline calculation stipulations, dismissal of remaining counts of the indictment, and the return of Singleton's residence to his family. The plea agreement does not contain

any provision regarding cooperation, and paragraph 19 of the plea agreement provides:

This agreement constitutes all the terms of the plea bargain between the government and the defendant, and the government has made no other representations to the defendant or his attorney.

Singleton contends that the plea agreement does not explicitly mention cooperation because everyone understood that he had always refused any hint of cooperation. The district court found that the plea agreement [*4] itself contained no ambiguities whatsoever but identified the comments made by the two attorneys during plea negotiations as one source of confusion outside the plea agreement. On March 24, 1993, Singleton was sentenced to fifteen years of incarceration, and the Government returned his residence to his family.

On September 9, 1993, the Government issued a grand jury subpoena to Singleton. On September 20, 1993, Singleton moved to quash the subpoena on the ground that it violated the terms of the plea agreement, and the Government filed its opposition on October 1. On October 6, 1993, the district court conducted a hearing but did not make a decision at that time.

On November 19, 1993, after both Singleton and the Government filed supplemental letter briefs, the district court denied Singleton's motion to quash. Although Singleton's motion for reconsideration was denied on December 8, 1993, the district court signaled its agreement with Singleton's argument that the plea agreement precluded the Government from seeking grand jury testimony on matters arising out of the indictments. Subsequently, Singleton was called before the grand jury on January 11, 1994, where he refused to answer [*5] any of the Government's questions.

1995 U.S. App. LEXIS 3302, *

On July 28, 1994, the Government requested the district court to issue an order to show cause why Singleton should not be held in contempt, and Singleton filed his opposition on September 16, 1994. On September 23, 1994, the district court held oral arguments. The district court acknowledged that the plea agreement was clear on its face regarding cooperation but nevertheless concluded that Singleton believed that he would not be called before the grand jury. On September 27, 1994, the district court entered an order denying the Government's motion for contempt. The Government timely appeals.

II

The Government contends that the district court erred in denying its motion for an order of civil contempt because the plea agreement between the Government and Singleton does not prohibit the enforcement of a federal grand jury subpoena.

We review the district court's finding of fact regarding the terms of the plea agreement under a clearly erroneous standard. *United States v. Helmandollar*, 852 F.2d 498, 501 (9th Cir. 1988). This court "must affirm the trial court's determinations unless [this court is] left with the definite [*6] and firm conviction that a mistake has been committed." *Id.* at 501 (quoting *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir.), cert. denied, 469 U.S. 824, 83 L. Ed. 2d 46, 105 S. Ct. 101 (1984) (quotations omitted)). The district court was required to determine "what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty." *United States v. De La Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993). The defendant's understanding at the time of the plea controls. *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir. 1992), amended, reh'g denied, 990 F.2d 1163 (9th Cir. 1993). A claim that the Government breached the terms of the plea agreement, which is a question of law, is subject to de novo review.

United States v. Fisch, 863 F.2d 690, 690 (9th Cir. 1988).

The plea agreement between Singleton and the Government is clear on its face and does not contain any provision indicating that the Government agreed [*7] to forego its grand jury subpoena power or that Singleton reserved some affirmative right to refuse to cooperate. Parol evidence exists, however, to suggest that Singleton agreed to the plea agreement only because he believed that the plea agreement included an affirmative right to refuse to cooperate with the Government. The Fourth Circuit, in *United States v. Garcia*, 956 F.2d 41 (4th Cir. 1992), barred the Government from compelling testimony on the basis of parol evidence even though the plea agreement was unambiguous on its face.

In *Garcia*, the Government sent a letter to the defendant's counsel memorializing an oral agreement. The letter stated that, "In return for this guilty plea to Count One of the Indictment, the Government will (a) not require as part of the plea agreement that the defendant cooperate with law enforcement," *Id.* at 42. Although the plea agreement did not contain any provision stating that the defendant was not required to cooperate, the Fourth Circuit admitted the parol evidence and found that the Government could not compel testimony.

In this case, parol evidence comes not from a letter [*8] written by the Government, but from the district court's own observation of the plea negotiations. The district court made a finding of fact as to Singleton's objective belief regarding the terms of the plea agreement. On the basis of its own observations of the discussion between Mr. Serra and the prosecutor during plea negotiations, the district court concluded that Singleton's agreement to plead guilty was influenced by his understanding that he would not be required to cooperate with the Government. The district court recognized that Singleton had a firm position on his refusal to cooperate.

1995 U.S. App. LEXIS 3302, *

The district court could not remember specific statements which led to this impression, but stated that after observing the negotiations, it had a firm impression that Singleton was not going to cooperate with the Government. While such impressions are difficult to evaluate for clear error, difficulty of review does not mandate the conclusion that the impression was clearly erroneous. Furthermore, in this case, outside factors support the district court's impression that Singleton could have reasonably believed the terms of his plea agreement to include immunity from grand jury subpoenas.

[*9] Given the fact that the § 5K1.1 provision was included in previous discussions where various cooperation agreements were contemplated, it is not unreasonable for Singleton to have believed that an absence of a § 5K1.1 provision indicated that he would not be required to cooperate with the Government. The Government erroneously asserts that previous plea discussions should be entirely ignored when interpreting the plea agreement that was finally signed. While it is true that previous plea offers were no longer available, prior discussions had an obvious effect on Singleton's understanding of the terms of the signed plea agreement.

Singleton has testified that he understood cooperation to include revealing and testifying against coparticipants in his offenses. Singleton's understanding of "cooperation" to include compelled testimony is plausible as the *Garcia* court found. The Fourth Circuit in *Garcia* rejected the argument that "cooperation" means only voluntary cooperation and not compelled testimony and found that the term "cooperate" is ambiguous in the context of a plea agreement:

In short, there is no general rule that, as a matter of law, "cooperate" in a plea agreement [*10] means only "voluntary" cooperation. The government knows the

word "voluntary," and could have avoided any ambiguity by using it .

...

Garcia, 956 F.2d at 45.

The Government tries to distinguish *Garcia* by emphasizing *Garcia*'s lack of English fluency. The structure of the *Garcia* opinion, however, indicates that the Fourth Circuit first concluded that the term "cooperate" in a plea agreement does not necessarily mean only "voluntary" cooperation. The court then used the defendant's lack of English fluency as an additional support for its conclusion.

Singleton's belief regarding cooperation was further buttressed by the fact that he pled guilty in exchange for a fifteen-year sentence. In earlier plea negotiations, he was informed that he would not be allowed less than a fifteen-year sentence without an agreement to cooperate. The district court's finding of fact that Singleton reasonably understood one of the terms of the plea agreement to be that he would not have to cooperate, voluntarily or involuntarily, with the Government is not clearly erroneous.

The Government warns that acceptance of the district court's holding would result in a *per* [*11] *se* prohibition against issuing grand jury subpoenas to any defendant who declines to voluntarily cooperate with a federal criminal investigation. Such a prohibition can be avoided if the Government clearly discloses at the outset of plea negotiations that refusal to cooperate with the Government does not guarantee immunity from grand jury subpoenas. Furthermore, the Government should disclose that if the defendant refuses to answer a grand jury subpoena, he may be found in contempt and may have to serve a longer sentence than bargained for in the plea agreement. Such clarification will assist the defendant in making a

1995 U.S. App. LEXIS 3302, *

more accurate decision and can lead to a stable plea agreement that reflects the understanding of both parties.

If the Government were allowed to issue the grand jury subpoena to Singleton and hold him in contempt for refusing to testify, Singleton would not get the full benefit of the bargain. There is no question that Singleton received a favorable plea agreement and that his is not a case where the Government is offering nothing in exchange for something. However, if Singleton were compelled to testify, he would be denied a benefit that was an important basis for [*12] his decision to accept the

plea agreement and without which he may have gone to trial.

III

We find that the terms of Singleton's plea agreement, as supplemented by parol evidence, restrict the Government from compelling Singleton's testimony. Therefore, Singleton cannot be held in contempt for his refusal to comply with the grand jury subpoena. We **AFFIRM** the district court's order denying the Government's motion for an order of civil contempt against Singleton.

AFFIRMED.

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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11
12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 BARRY LAMAR BONDS,

16 Defendant.

17
18 In re Trial Subpoena of

19 GREG FRANCIS ANDERSON.
20
21

Case No.: CR 07-0732 SI

Trial Date: March 21, 2011
Time: 8:30 a.m.
Place: Courtroom 10
Honorable Susan Ilston

**DECLARATION OF JACK TRIMARCO
IN SUPPORT OF GREG ANDERSON'S
MOTION TO DETERMINE THAT
FURTHER CUSTODIAL SANCTIONS
WOULD BE PUNITIVE RATHER
THAN COERCIVE**

Date: March 22, 2011
Time: 11:00 a.m.
Place: Courtroom 10
Honorable Susan Ilston

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DECLARATION OF JACK TRIMARCO

I, Jack Trimarco, hereby declare and state:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify to such matters.

2. I submit this expert declaration in support of Greg Anderson's Motion to Determine that Further Custodial Sanctions Would Be Punitive Rather than Coercive.

3. I have had almost 21 years of service with the Federal Bureau of Investigation ("FBI"). Specifically, I was the Program Director for the Los Angeles branch of the FBI Polygraph Unit for 8 years, an FBI profiler for over 7 years, and served as the Los Angeles FBI Office Polygraph Unit Chief before my retirement.

4. Post-retirement, I became the U.S. Department of Energy Polygraph Program's Inspector General.

5. I am a Board Certified Forensic Examiner and member of the Ethics Committee for the California Association of Polygraph Examiners.

6. I serve as a member of several nationally acclaimed Polygraph and Forensic Examiner Associations and was recently recognized for outstanding leadership and dedicated leadership by the American Association of Police Polygraphists.

7. I am also a licensed Private Investigator.

8. I have conducted training as an expert in the areas of Polygraph Examination, Hostage Negotiation, Psychological Profiling, and Interrogation for numerous state and federal government law enforcement agencies.

9. I have consulted, conducted polygraph examinations, and testified as an expert witness in numerous high profile FBI investigations involving terrorists, espionage, and fraud.

10. I have conducted polygraph examinations in top-secret security

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**JACK TRIMARCO
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Edward I. Gelb, Ph.D.
Los Angeles, California

Jack Trimarco was the Program Manager for the Federal Bureau of Investigation Polygraph Unit at the Los Angeles Field Office from 1990 until his retirement in 1998 as a Special Agent, after almost 21 years of service. He is the former Inspector General for the U.S. Department of Energy Polygraph Program and is currently a member of the Ethics Committee, California Association of Polygraph Examiners (C.A.P.E.). Mr. Trimarco is nationally recognized for his success as a polygraph examiner. Following his training with the Department of Defense and the F.B.I., he has conducted more than 3,000 polygraph examinations throughout the world.

Ronald W. Hilley
San Francisco, California

Ronald R. Homer
San Francisco, California

Among cases in which he consulted, or actually conducted polygraph examinations for the F.B.I., were the Oklahoma City Bombing; the "Unabomber"; Campaign Contributions to the Democratic National Committee; the Dr. Peter Lee Espionage Case; the Marquisha Candler Kidnap/Murder; the Rosemary Banelos Kidnap/Murder; the Assassination of D.E.A. Agent Enrique Camarena in Mexico; "Whitewater"; the Dr. Wen Ho Lee Espionage Case; J.D.L. Odeh Bombing Death; the World Trade Center Bombing (1993); numerous cases involving classified foreign terrorists and espionage; "Fed buster"; Princess Cruises Extortion; Gerald Gallegos Serial Killer; Bank of America, Davis, California, hostage standoff; V.A. Hospital, Brentwood, California, hostage standoff; Top 10 Fugitive, Claude Dallas; Top 10 Fugitive, Daniel Barney; Charles Keating Fraud Investigation; Bombing of Pan Am Flight 103; L.A.P.D. Rampart Scandal.

Richard W. Kelfer
Orlando, Florida

William K. Teigen
Dallas, Texas

Kenneth A. Vardell
Boulder, Colorado

During his F.B.I. career, Jack Trimarco also specialized as a Psychological Profiler working with noted author and former head of the F.B.I.'s Behavioral Science Unit, John Douglas. The assistance offered included unknown offender profiles, threat assessments, overall crime analysis, trial strategies, and expert testimony. Jack Trimarco is recognized as an expert in the fields of Polygraphy, Interviewing and Interrogation. He has taught more than 70 seminars on these topics throughout the United States and has conducted training for the F.B.I. Academy, C.I.A., U.S. Attorney's Offices, U.S. Department of Justice, I.N.S., American Polygraph Association (A.P.A.), California Association of Polygraph Examiners (C.A.P.E.), American Association of Police Polygraphists (A.A.P.P.), the Department of Defense Polygraph Institute (D.O.D.P.I.), and many other state and federal governmental law enforcement agencies.

RECENT AWARDS

Jack received the prestigious 2010 Holly Canty Memorial Award from the American Association of Police Polygraphists (A.A.P.P.) for outstanding leadership and dedicated service to the A.A.P.P. and the polygraph profession. The vote by the Board of Directors was unanimous.

MAJOR CASE INVOLVEMENT

Dr. Wen Ho Lee Espionage Case; The "Unabomber"; "Whitewater"; Oklahoma City Bombing; World Trade Center Bombing (1993); numerous cases involving classified foreign terrorists and espionage. "Fed buster"; Princess Cruises Extortion; Gerald Gallegos Serial Killer; Bank of America, Davis, CA hostage standoff; V.A. Hospital, Brentwood, CA hostage standoff; Enrique Camarena assassination; Top 10 fugitive, Claude Dallas; Top 10 Fugitive, Daniel Barney; Charles Keating Fraud Investigation; Bombing of Pan Am Flight 103; Dr. Peter Lee Espionage Case; L.A.P.D. Rampart Scandal.

POLYGRAPH EXPERIENCE

Former Inspector General, Department of Energy Polygraph Program, 2000-2002; Polygraph Unit Chief, F.B.I. Los Angeles Field Office 1990-1998. Conducted more than 1,100 polygraph examinations in connection with F.B.I. investigations. Selected by the U.S. Department of Justice and the F.B.I. to conduct polygraph examinations in sensitive intelligence matters and criminal investigations throughout the U.S. and abroad. Formerly held top-secret security clearance. Established private practice in 1998. Conducted more than 70 seminars/ presentations on interviewing/interrogation and polygraph related matters throughout the United States. Conducted training at the F.B.I. Academy, C.I.A., and U.S. Department of Justice.

POLYGRAPH TESTIMONY AS AN EXPERT WITNESS

California vs. Renee Lloyd (1993) Superior Court, San Bernardino County;
U.S. vs. Noe Orozo Viveros (1994) U.S. District Court, Central District of California;
U.S. vs. Samson Gillette (1999), U.S. District Court, Central District of California;
California vs. Catarino Gonzales (2001) Superior Court, Los Angeles County;
California vs. Gary Bearman (2003) Superior Court, Orange County.

PROFESSIONAL MEMBERSHIPS

Member of the Ethics Committee, California Association of Polygraph Examiners (C.A.P.E.); Board Certified Forensic Examiner, American Board of Forensic Examiners; American Polygraph Association (A.P.A.); Advanced and Specialized Polygraph Examiner, American Association of Police Polygraphists; Diplomat, American Academy of Forensic Sciences; Lifetime Member, American College of Forensic Examiners; National Association of Legal Investigators (N.A.L.I.); Society of Former Special Agents of the Federal Bureau of Investigation; California Association of Licensed Investigators (C.A.L.I.); Ventura County Bar Association; Los Angeles County Bar Association; San Fernando Valley Bar Association; and Criminal Courts Bar Association (sustaining member).

EDUCATION

Montana State University at Billings, B.S., Psychology, 1976, High Honors; Montana State University at Billings Graduate School, Psychology (1977); Jacksonville University, Jacksonville, Alabama, attended Graduate School, Psychophysiology, 1990 (no graduate degrees).

EMPLOYMENT

United States Air Force (USAF), 1967-71; USAF "Airman of the Year"—Italy, 1968; Yellowstone County Sheriff, Billings, Montana, Patrolman 1971-1973 and Detective 1973-78; Federal Bureau of Investigation, Special Agent, 1978-1998. Received numerous commendations for exceptional performance. Nominated twice for F.B.I. Medal of Valor; F.B.I. Polygraph Unit Chief (Los Angeles-Retired); Former Inspector General, Polygraph Program, U.S. Department of Energy-Office of Counterintelligence (2000-2002); Ventura County District Attorney's Office (Forensic Polygraph Examiner) (2000-present); Certified Polygraph Examiner (A.P.A.); California State Private Investigator #20970; ongoing polygraph activities: Ventura County Public Defender's Office; Ventura County Sheriff's Department; Orange County Public Defender's Office; Federal Public Defender's Office (Central District of California); Oxnard Police Department.

AREA OF EXPERTISE

F.B.I. Polygraph Examiner; F.B.I. Hostage Negotiator; F.B.I. Psychological Profiler; F.B.I. Defensive Tactics/Firearms Instructor; F.B.I. S.W.A.T. Team Member; F.B.I. Interrogation Instructor and Homicide Investigation Instructor.

POLYGRAPH TRAINING

Department of Defense Polygraph Institute, 14-week polygraph course. Attended 56 polygraph training seminars conducted by the F.B.I. or professional polygraph organizations within the United States. Instructed at numerous federal, state and local agencies, national and state polygraph associations, private and professional groups.

MEDIA EXPERT APPEARANCES

Over one-hundred appearances on national television programs, including: Dr. Phil, Oprah, Greta Van Susteren, Nancy Grace, The O'Reilly Factor, Hannity & Colmes, Catherine Crier, Good Morning America with Diane Sawyer, Fox News, Jane Vellez-Mitchell.