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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,) Case No. CR 07 0732 SI
19)
20 Plaintiff,) **DEFENDANT’S MOTION FOR A**
21) **DIRECTED VERDICT OF ACQUITTAL**
22 vs.) **UNDER FED.R.CRIM.P. 29**
23 BARRY LAMAR BONDS,)
24 Defendant.) Date: TBA
25) Time: TBA
26) Judge: The Honorable Susan Illston
27)
28)

29 **INTRODUCTION**

30 Defendant Barry Bonds now moves under Federal Rule of Criminal Procedure 29 to
31 dismiss all counts against him on the ground that, as to each of the five charged offenses, the
32 government has failed to offer evidence sufficient to convince a reasonable jury that the
33 defendant’s guilt has been proven beyond a reasonable doubt. Mr. Bonds’ motion will be made
34 **Defendant’s Motion for a Directed**
35 **Verdict of Acquittal Under Fed.R.Crim.P. 29**

orally as to Counts One to Five on the basis of the legal standard explicated below. Written argument is also submitted as to the false statement charges in Counts Three and Four.

THE LEGAL STANDARD

Claims of insufficient evidence are reviewed *de novo*. *United States v. Jiang*, 476 F.3d 1026, 1029 (9th Cir. 2007). The evidence is insufficient to support a conviction if, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *United States v. Milwitt*, 475 F.3d 1150, 1152 (9th Cir. 2007).

To satisfy the *Jackson v. Virginia* test, the government's evidence, including all reasonable inferences drawn therefrom, must be substantial and raise more than mere suspicion of guilt. *United States v. Messer*, 197 F.3d 330, 343 (9th Cir. 1999). As *Jackson* held, a mere modicum of evidence cannot support conviction beyond a reasonable doubt. 443 U.S. at 320. Where the government relies on circumstantial evidence, the inferences drawn therefrom must be reasonable and not speculative. *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002); *United States v. Knowles*, 66 F.3d 1146 (11th Cir. 1995). Where two equally strong inferences can be drawn from the evidence, one supporting guilt and the other innocence, the evidence is insufficient to support conviction. *See, e.g., United States v. Ramos-Rascon*, 8 F.3d 709, 710 (9th Cir. 1993) (reversing a conviction because, though "strongly suggestive" of guilt, conduct was also consistent with innocence); *United States v. Bautista-Avila*, 6 F.3d 1360, 1363 (9th Cir. 1993) (same); *United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992) (same)

I. THE EVIDENCE IS INSUFFICIENT TO CONVINCING A REASONABLE JURY EITHER THAT DEFENDANT BONDS TOOK THE "CREAM" AND THE "CLEAR" BEFORE THE 2003 MAJOR LEAGUE SEASON OR THAT HE LIED TO THE GRAND JURY ON THE SUBJECT

Count Four alleges that Barry Bonds knowingly made a material false declaration before the grand jury when he testified that "prior to last season," i.e., prior to the 2003 major league baseball season, Mr. Bonds "never took anything that [Greg Anderson] asked you to take..." more specifically, "oils like this or anything like this....." (Third Superceding Indictment, at paragraphs 16 and 17) It is undisputed that the "oils like this or anything like this" referred to

1 “the clear” and “the cream.” The “clear” is a liquid; the “cream” is an ointment or lotion-like
2 substance. These substances had been shown to Mr. Bonds earlier during his grand jury
3 testimony, and he had testified that he had been given these substances by Greg Anderson at the
4 end of 2002 and during the 2003 baseball season. (Bonds GJT at 23-32)¹ During that period of
5 time, Greg Anderson placed the “clear” under Mr. Bonds’s tongue, and rubbed the “cream” on
6 his arm. (*Id.*) The vials of the substances had been placed before Mr. Bonds when he was asked
7 the questions which form the basis of Count Four. (*Id.*)

8 There is no evidence in the record that Greg Anderson asked Mr. Bonds to take, or that
9 Mr. Bonds did take, ingest, or use, the clear or the cream before the 2003 season. There is
10 evidence that a urine sample taken from Mr. Bonds in May of 2003 tested positive for the
11 substances contained in the clear and the cream, a fact consistent with Mr. Bonds’s testimony
12 that Anderson administered those substances to him during the 2003 season. But there is simply
13 not a shred of evidence in this record that Mr. Bonds took those substances at any earlier time.

14 The only other testimony in the record concerning the clear and the cream came from
15 other professional athletes — the Giambi brothers, Marvin Bernard, and Randy Velarde. Their
16 testimony was that they received the clear and cream from Anderson in late 2002 and in the lead-
17 up to the 2003 season, during which Major League Baseball intended to conduct survey testing to
18 determine the prevalence of the use of anabolic steroids by major league players. As the Court
19 has instructed the jury, that testimony has no probative value on the issue of whether Mr. Bonds
20 received the clear and the cream from Anderson. Furthermore, it tends to refute the proposition
21 that Anderson distributed to *anyone* prior to the lead-up to the 2003 season.

22 No reasonable jury could find it proven beyond a reasonable doubt that Mr. Bonds took
23 the clear or the cream before the 2003 season. Ergo, no reasonable jury could find it proven
24 beyond a reasonable doubt that Mr. Bonds testified falsely in denying that he took the clear or the
25 cream before the 2003 season. Count Four must be dismissed as unsupported by sufficient
26 evidence.

27
28 ¹ The relevant pages of the Grand Jury transcript are attached as Exhibit A.
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1 **II. THE EVIDENCE IS INSUFFICIENT TO CONVINCCE A**
2 **REASONABLE JURY EITHER THAT GREG ANDERSON**
3 **GAVE DEFENDANT BONDS HUMAN GROWTH HORMONE**
4 **OR THAT MR. BONDS LIED TO THE GRAND JURY ON THE**
5 **SUBJECT**

6 Count Three alleges that Mr. Bonds knowingly made a false statement to the grand jury
7 when he denied that Greg Anderson had ever given him what the defendant understood to be
8 human growth hormone. (Third Supersceding Indictment, at paragraphs 16 and 17)

9 It is beyond dispute that in its effort to prove the HGH charge, the government has *not*
10 introduced evidence of: (1) a blood or urine analysis in which Mr. Bonds tested positive for
11 HGH; (2) testimony by Mr. Anderson or an admission by Mr. Bonds that the former gave HGH
12 to the latter; or (3) testimony by any witness that he or she observed Mr. Anderson give to Mr.
13 Bonds a substance the witness knew to be HGH.

14 The government has introduced evidence that Greg Anderson was Mr. Bonds's weight
15 trainer and a frequent visitor to his home; that Anderson had access to human growth hormone;
16 that he distributed HGH to professional athletes; and that athletes who take HGH frequently do
17 so by means of an injection in the abdominal area. The government also introduced testimony
18 from Kathy Hoskins that on a single occasion while she was packing the defendant's clothes
19 prior to a road trip, she witnessed Greg Anderson inject defendant Bonds in the navel with an
20 unknown substance. (RT 1560, 1580).²

21 Obviously, the credibility of Ms. Hoskins's testimony is subject to challenge, but the
22 issue of credibility is not before the Court on a Rule 29 motion; the Court assumes the testimony
23 is truthful for the purpose of deciding the sufficiency of the evidence. Thus the pivotal issue for
24 the Court as to Count Three is whether, assuming Ms. Hoskins witnessed Mr. Bonds being
25 injected, a reasonable jury could find that the record evidence is not only consistent with the
26 inference that the injection consisted of HGH, but also is inconsistent with any other conclusion.
27 If a reasonable jury would have to conclude that the evidence can be reconciled with the
28 conclusion that Anderson injected Mr. Bonds with a substance other than HGH, the defendant

² The relevant pages of the Reporter's Transcript are attached as Exhibit B.
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1 must be acquitted on Count Three. *United States v. Ramos-Rascon*, 8 F.3d 709, 710 (9th Cir.
2 1993) (reversing a conviction because, though “strongly suggestive” of guilt, conduct was also
3 consistent with innocence); *United States v. Bautista-Avila*, 6 F.3d 1360, 1363 (9th Cir. 1993)
4 (same); *United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992) (same)

5 Obviously, Ms. Hoskins’s testimony that Anderson injected Mr. Bonds with *something*
6 may have significance to charges other than Count Three: e.g., the Count One charge that the
7 defendant falsely denied taking steroids from Anderson; or the Count Two charge that Mr. Bonds
8 falsely denied being injected by anyone “like Mr. Anderson or any associates of his.” But Mr.
9 Bonds cannot be convicted on Count Three unless a reasonable jury can find beyond a reasonable
10 doubt that Anderson injected him with HGH.

11 The abdomen is a favored area for a subcutaneous injection of any substance, legal or
12 illegal, because flesh can be pinched there to facilitate the injection. The government introduced
13 testimony from Stan Conte that members of the Giants team receive injections of vitamin B-12.
14 The government alleges that Anderson provided Mr. Bonds with injectable steroids, and it has
15 introduced evidence that Anderson possessed injectable steroids in his home and that he injected
16 Randy Valarde with steroids. If Kathy Hoskins witnessed an injection, that fact could surely
17 support a suspicion that the injection was of HGH, but no more. A reasonable juror could not
18 rule out the possibility that the unknown substance purportedly injected into Mr. Bonds’s navel
19 was something other than HGH. Mr. Bonds must be acquitted on Count Three.

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CONCLUSION

For the reasons stated above, defendant Bonds's motion under Rule 29 to acquit on Counts Three and Four must be granted and those counts must be dismissed.

Dated: April 5, 2011

Respectfully submitted,

ALLEN RUBY (SKADDEN, ARPS, ET AL.)

ARGUEDAS, CASSMAN & HEADLEY, LLP

RIORDAN & HORGAN

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Dennis P. Riordan

By /s/ Donald M. Horgan
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