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Bonds Wins in the 9th: Players, PEDs and the Rules of Evidence — or 'Say Hey' versus Hearsay

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On June 11, 2010, the Ninth Circuit issued an opinion affirming the District Court's exclusion of key steroids evidence against all-time home run king Barry Bonds. Much is likely to be written about this decision in terms of its impact on the rules of evidence. But what is likely be overlooked is the role this case plays in potentially reversing the trend of high profile prosecutions against professional athletes.

What is particularly noteworthy about cases such as the Bonds case -- and what should serve as a warning to all professional athletes as well as the teams and organizations that employ them -- is how rarely the case ends up hinging on allegations of steroid use itself. Even with evidence such as blood and urine tests, causation can pose a serious challenge to prosecutors. Moreover, allegations often involve several years of alleged use, and any prosecution becomes more challenging as time passes. Witnesses can be (and, as explained below, have been) unwilling to testify against high-profile athletes, memories can be imperfect and the chain of custody can be difficult to establish. None of these challenges has deterred the prosecution from moving the case against Mr. Bonds forward.

Mr. Bonds was a key figure in the U.S. Attorneys' investigation of the Bay Area Laboratory Cooperative ("BALCO"). The investigation of BALCO began in 2003 after an anonymous tipster -- who later turned out to be U.S. Olympic spring Coach Trevor Graham -- told the U.S. Anti-Doping Agency that BALCO was providing professional athletes with a new, undetectable anabolic steroid. When Bonds' trainer Greg Anderson was indicted by a grand jury on charges of knowingly providing athletes with steroids, attention almost immediately focused on the slugger. Indeed, the media spotlight shifted from BALCO to Mr. Bonds, and he became the public focus of the scandal. There was speculation that Mr. Bonds used anabolic steroids and other banned Performance Enhancing Drugs ("PEDs") provided by Mr. Anderson from BALCO. That speculation intensified after Mr. Bonds testified before the

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grand jury himself in 2003, stating that he received certain substances from Mr. Anderson, but that he did not know that they were illegal.

Perhaps unexpectedly for federal prosecutors, however, Mr. Bonds has proved to be a difficult target. The government had a difficult time amassing sufficient evidence to return charges based on steroid use, and several key witnesses, including Mr. Anderson -- his longtime trainer and childhood friend -- refused to testify. Mr. Anderson even chose to spend over a year in jail instead of cooperating with prosecutors. Ultimately the major suspects in the BALCO case agreed to plea bargains with the government, and the story effectively ended.

However, the prosecution was not finished with Mr. Bonds. In 2005, the government changed its strategy and sought to charge Mr. Bonds with perjury in connection with his grand jury testimony in 2003. The prosecution's new theory was that, while it could not amass sufficient evidence of Mr. Bonds' alleged steroid use, it could convict him of lying to the grand jury. In 2005 a second grand jury was convened to hear these charges, and ultimately returned a Second Superseding Indictment including ten counts of perjury and one count of obstruction of justice. Trial was set to begin on March 9, 2009. However, Mr. Bonds filed a motion in limine that sought to suppress certain evidence, notably the results of laboratory tests on Mr. Bonds' blood and urine, expert opinion on anabolic steroids and human growth hormone and other documentary evidence. The central ground for the motion was the absence of corroborating witnesses, in particular Mr. Anderson.

On February 7, 2009, the District Court granted Mr. Bonds' motion in part. The government then took the rather unusual step of filing an interlocutory appeal from that order. The government asserted that there was sufficient circumstantial evidence corroborating the government's allegation that the blood and urine tests at issue were, in fact, Mr. Bonds'. For example, Mr. Anderson was in charge of acting as courier for the samples from Mr. Bonds to the offices of BALCO, the company that allegedly provided him with PEDs and subsequently tested him and provided him with a steroid known as "the clear." A government raid on Mr. Anderson's house discovered records related to the tests, including ledgers in which various samples were marked as belonging to "Barry" and "B. Bonds." The government argued that these facts were sufficient to overcome Mr. Bonds' motion.

Each of the parties' briefs before the Ninth Circuit echoed the arguments made in the lower court. The government asserted that, even in the absence of corroborating testimony by Mr. Anderson there was more than sufficient circumstantial evidence linking Bonds to the blood and urine samples provided to BALCO. The government also asserted that logs related to Mr. Bonds' tests are admissible as business records under Rule 803(6) of the Federal Rules of Evidence.

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Finally, it argued that a jury should be able to hear Anderson's out-of-court statements regarding Mr. Bonds' samples under several exceptions to the hearsay rule. Those statements, according to the government's opening brief, are admissible as an authorized admission under Rule 801(d)(2)(C), admissions of a party opponent under Rule 801(d)(2)(D), as co-conspirator statements under Rule 804(b)(3), or otherwise admissible under the "catch-all" exception of Rule 807. Each of the government's positions with respect to Mr. Anderson sought to persuade the court that Mr. Anderson was acting either as Mr. Bonds' employee or agent during the events at issue.

Mr. Bonds set forth several arguments in opposition. As a preliminary matter, he argued that the Court was without jurisdiction to even hear the appeal, since an order excluding evidence is not a "final" order for purposes of appeal. This argument was based on what Bonds urged was a split of authority in the Ninth Circuit regarding the requirements for an interlocutory evidentiary appeal. On a substantive level, Bonds refuted the government's position. First, he argued that the government failed to establish that Mr. Anderson was authorized to speak on his behalf, and so his statements cannot be admitted under the authorized agent exception to the hearsay rule, 801(d)(2)(C). Second, he argued that Mr. Anderson was "at most" an independent contractor and so not capable of speaking as his agent under Rule 801(d)(2)(D). Finally, Mr. Bonds claimed that none of Mr. Anderson's statements had the requisite degree of trustworthiness required for the catch-all exception under Rule 807. These facts, argued Mr. Bonds, showed that the District Court's ruling was not an abuse of discretion.

The Ninth Circuit's 2-1 split Opinion agreed with Mr. Bonds. Specifically, the Court, in an opinion authored by Judge Mary B. Schroeder, found that the District Court correctly excluded Mr. Anderson's statements under Rule 807. The Court also found that such statements were not admissible under Rule 801(d)(2)(C) and (D) because Mr. Anderson did not have express or implied authority to act on Mr. Bonds' behalf, and that Mr. Anderson was not Mr. Bonds' employee or agent, respectively. The Court further found that the logs related to Mr. Bonds' tests were properly excluded because they could not be authenticated as relating to Bonds. The dissent, authored by Judge Carlos T. Bea, reasons that the statements should be considered hearsay, but rather should be considered the statements or admissions of a party-opponent.

It is unclear whether or how the prosecution intends to proceed now that the Ninth Circuit has upheld the exclusion of what was undoubtedly the prosecution's key evidence against Mr. Bonds. According to Mathew Rosengart, a former federal prosecutor who is now Co-Chair of Manatt's Entertainment & Media Litigation Department, the Ninth Circuit's opinion creates major hurdles for the prosecution going forward. "This is obviously a very significant setback

for the government, especially in view of Anderson's stated preference for going to jail on contempt charges rather than testifying," Mr. Rosengart said. "If he maintains that position, which precludes the government from using him as a witness, the government's case has been severely limited. It is now left with just a small piece of the central piece of its case -- that Bonds knowingly used steroids. While the opinion represents a technically correct, albeit narrow view of the rule against hearsay, I would expect further steps seeking more judicial review from the government."

If the government does seek further appellate relief, the next steps would be a petition for rehearing en banc and, failing that, a petition to the Supreme Court for certiorari. Neither of these options guarantees further review, but the existence of these possibilities means the matter is not yet over.

For the time being, however, one thing is for certain: this case stands as a significant setback in the government's attempt to prosecute Mr. Bonds. More importantly, it also signals to athletes that a tenacious defense can beat a shifting offense.

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