No. 09-10079

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

BARRY LAMAR BONDS,

Defendant-Appellee.

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA
NO. 07-CR-00732-SI

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INTRODUCTION

The district court excluded statements made by Barry Bonds's personal trainer, Greg Anderson, to BALCO employee James Valente when Anderson delivered Bonds's urine and blood samples to BALCO for testing. On appeal, the government argues that the district court misconstrued Federal Rules of Evidence 801(d)(2)(C), 801(d)(2)(D), and 807, and made clearly erroneous findings of fact in barring the government from using this evidence at trial. In the grand jury, Bonds admitted that he gave Anderson his urine and blood samples to deliver to BALCO for testing. The government argues that this testimony proved that Bonds authorized Anderson to identify the samples, either impliedly or because that task

fell within the scope of Anderson's duties as Bonds's agent or employee, and that the district court legally and factually erred in concluding otherwise. The government also argues that the district court clearly erred in finding that Anderson's statements were untrustworthy and thus inadmissible under Rule 807.

Bonds (1) suggests that this Court lacks jurisdiction because a ruling excluding evidence is not a final order; (2) claims that the government failed to adequately preserve its claims; (3) argues that the government did not satisfy Rule 801(d)(2)(C) as a matter of law because Bonds's grand jury testimony shows only that Bonds authorized Anderson to "act" (*i.e.*, deliver the samples) but not necessarily to "speak" (*i.e.*, identify the source of the samples); (4) contends that the district court's Rule 801(d)(2)(D) ruling was legally correct because the government did not disprove that Anderson was an independent contractor; and (5) without ever addressing the government's argument that the court erroneously focused on *Valente*'s conduct in assessing whether *Anderson*'s statements were trustworthy, defends the district court's Rule 807 ruling as "entirely correct" because "trial courts are afforded wide latitude and flexibility" in analyzing trustworthiness. Appellee's Brief ("AB") 2-7, 11-15, 34-41, 48-49.

These arguments cannot overcome the district court's legal and factual mistakes or justify its clearly erroneous exclusion of evidence.

First, "Title 18 U.S.C. § 3731 provides a statutory exception to the final judgment rule for certain orders suppressing or excluding evidence." *Flanagan v. United States*, 465 U.S. 259, 265 n.3 (1984). The government's properly certified appeal falls squarely within the exception.

Second, Bonds's preservation claim is untrue. The government specifically raised, Bonds specifically objected to, and the district court specifically ruled on the admissibility of Anderson's statements under Rules 801(d)(2)(C), (D), and 807.

Third, this Court has never held that "speaking authority" cannot be implied, and cases from other circuits have held that it can.

Fourth, as to the alleged "independent contractor limitation," the record shows that Anderson was not an independent contractor, or if he was, he was still acting as Bonds's authorized agent when he delivered the samples to BALCO for testing. The so-called "independent contractor limitation" was thus not a proper legal basis to exclude Anderson's statements.

Finally, Bonds does not even try to defend most of the district court's rationale for finding Anderson's statements untrustworthy. Nor could he. The record shows unequivocally that Bonds authorized Anderson to take these samples to BALCO to have them tested, and it shows unequivocally that Anderson had no

motive to lie about the fact that the samples came from Bonds. In his grand jury testimony, Bonds repeatedly vouched for Anderson's loyalty to him and touted their friendship. The district court mistakenly focused on how Valente handled the samples after Anderson delivered them rather than on evidence showing the trustworthiness of Anderson's statements. This was error.

Given the district court's factual and legal errors, it committed "a clear error of judgment" in excluding Anderson's statements identifying Bonds's samples and the corresponding laboratory test results from Bonds's perjury trial. Its ruling should be reversed.

JURISDICTION

Bonds claims that the Court may not have jurisdiction to accept this appeal because the government is not appealing from a final order. AB2-7.

In fact, in passing 18 U.S.C. § 3731, Congress "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975). The only Constitutional impediment to a government appeal in a criminal case is the defendant's right not to be put twice in jeopardy. *Id.* at 344. This is a pretrial appeal, so there is no such impediment here. *See United States v. W.R. Grace*, 526 F.3d 499, 505 (9th Cir. 2008) ("[t]he purpose of § 3731 is to give the government

a window of opportunity to challenge a district court's exclusion of allegedly material evidence before jeopardy attaches") (en banc).

Bonds argues, however, that the government must demonstrate that the order appealed from is a final order. *See* AB2-5 (citing *United States v. Dior*, 671 F.2d 351 (9th Cir. 1982)). This is incorrect. The Supreme Court, post-*Dior*, explicitly recognized that Section 3731 "provides a statutory exception to the final judgment rule for certain orders suppressing or excluding evidence." *See Flanagan*, 465 U.S. at 265 n.3. Moreover, in *W.R. Grace*, an en banc panel of this Court expressly held that Section 3731 provides the government with the right "[t]o an interlocutory appeal from a district court's evidentiary rulings in certain circumstances," and stated that it would not "read into the statute an unwritten additional hurdle." 526 F.3d at 505. In fact, no court, including this one, has ever held that it lacks jurisdiction over a properly certified government appeal of an order excluding or suppressing evidence. *See, e.g., United States v. Hickey,* 185 F.3d 1064, 1065 (9th Cir. 1999) (one "limited exception[]" to final judgment rule is "interlocutory criminal appeals by the government" under Section 3731); *United States v. Russell*, 804 F.2d 571, 573 (9th Cir. 1986) (Section 3731 allows government to take certain appeals even though there is no final judgment); *Government of the Virgin Islands v. Rivera*, 333 F.3d 143, 148 (3d Cir. 2003)

(section "3731 specifically provide[s] for appeals of certain non-final orders, including orders granting new trials and suppressing or excluding evidence.").

Bonds does not mention *Flanagan* or *W.R. Grace,* and his reading of *Dior* is inconsistent with both of these cases. Moreover, Bonds's reading of *Dior* would preclude the government from appealing any pretrial ruling excluding or suppressing evidence, and there is no way to reconcile it with *Wilson*'s central holding that Section 3731 should be applied to "authorize appeals whenever constitutionally permissible." 420 U.S. at 339. "Nor can it be squared with the statutory mandate that § 3731 'shall be liberally construed to effectuate its purposes.'" *United States v. Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007) (quoting *Wilson*, 420 U.S. at 339).

All that is required under Section 3731 is that the United States Attorney certify "that the appeal is not taken for the purpose of delay and that the evidence is substantial proof of a fact material in the proceeding." *W.R. Grace,* 526 F.3d at 506. That happened here. *See* ER2.

Bonds also argues – without support – that because the district court has delayed ruling on the government's alternative request to use the test results at trial for a non-hearsay purpose, its ruling may not be an order "excluding" evidence. *See* AB7. But the district court excluded the evidence for the purpose

for which it was offered, namely, to demonstrate that despite Bonds's repeated denials in the grand jury, urine and blood tests showed that he was taking steroids before 2003. That ruling deprives the government of the ability to introduce evidence to show that the test results prove that Bonds was lying when he testified that he was not taking steroids at that time. That this evidence may be admitted at trial for some non-hearsay purpose does not alter the fact that the court has "excluded" it as direct proof of Bonds's perjury.

Bonds's argument is just a variation on his final judgment argument and would unfairly impede the government's right to appeal pretrial rulings. The district court stated that it will not rule on the non-hearsay purposes of the evidence until trial has commenced, and thus refusal to hear the present appeal on those grounds would preclude review of the district court's order excluding it as substantive evidence. And, if Bonds were correct, it would lead to absurd results. For example, the government would never be permitted to appeal pretrial rulings suppressing statements taken in violation of *Miranda* because such statements could be admitted to cross-examine the defendant at trial. *See Oregon v. Hass,* 420 U.S. 714, 721-23 (1975). This was obviously not Congress's intent in passing Section 3731.

ARGUMENT

I. THE DISTRICT COURT CLEARLY ERRED IN EXCLUDING ANDERSON'S STATEMENTS

A. The Government Showed That Bonds Authorized Anderson To Deliver *and* Identify His Samples

Bonds argues that the government did not meet its burden under Rule 801(d)(2)(C) because it did not present direct evidence that when he gave Anderson samples to deliver to BALCO for testing, he also authorized Anderson to "speak" about the samples. *See, e.g.,* AB20-21 (government demonstrated at best that Anderson was authorized to "'do some task'" but not that he was authorized to speak about that task); AB17-20 (Rule 801(d)(2)(C) codifies common law "authorized admissions doctrine" which requires an "express" grant of "authority to speak").

This argument – that Rule 801(d)(2)(C) does not recognize "implied" authority to speak – was not the basis for the district court's decision. The court rejected the government's Rule 801(d)(2)(C) argument because it concluded that (1) the evidence did not show that Bonds had "hired" Anderson to deliver the samples; (2) Bonds was equivocal about the number of samples he had provided to Anderson; (3) the rationale for the Rule did not apply here because "[t]rainers, unlike lawyers, brokers, sales personnel, and those with supervisory

responsibilities, are not generally authorized to speak for principals"; and (4) the government "had not established that it was against Anderson's interest to identify the samples for Valente." ER11.

Bonds, perhaps understandably, defends only the third of the district court's reasons for rejecting the government's Rule 801(d)(2)(C) argument. As the government argued (Appellant's Opening Brief ("AOB") 30-31), and as Bonds concedes (AB26), "a party can bestow speaking authority on nearly anyone." Thus, the district court legally erred in concluding that the government had to show that Bonds *hired* Anderson to deliver the samples in order to establish that his statements were authorized admissions. Moreover, as the government demonstrated (AOB33-34), the law does not require that an authorized admission be against the declarant's interest. Given that the parties appear to agree that at least two of the four reasons the court gave for rejecting the government's Rule 801(d)(2)(C) argument are legally flawed, "the district court committed a clear error of judgment" in rejecting this Rule as a basis for admitting Anderson's statements. *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (internal quotation omitted); *see Koon v. United States,* 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

Rather than defend the district court's reasoning, Bonds argues that because the government presented no direct evidence that Bonds bestowed "actual speaking authority," its proffer was deficient as a matter of law. AB20, 22.[1] Applying the *de novo* standard applicable to interpretation of the Federal Rules of Evidence, *see United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006), this Court should reject Bonds's argument.[2]

Rule 801(d)(2)(C) nowhere states that "speaking authority" must be express, and case law interpreting the Rule makes clear that it can be implied. *See* AOB27 ("[s]peaking authority exists even though not expressly conferred where the nature of the relationship and the task the speaker is to perform imply this result") (citing

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[1] Bonds raised the argument below, *see* ER762-63, but the court did not rely on it in its order.

[2] Bonds claims the government raised implied authority for the first time on appeal. AB21-22, 27. He is wrong. *See* ER701 & 747-48 (government's pleading states that "[s]peaking authority can be either 'expressly or implicitly' bestowed" and that common sense dictates a finding that Bonds's authorizing Anderson to take his samples to BALCO for testing meant that he authorized him to identify the samples). Moreover, Bonds's reliance on *United States v. Chang*, 207 F.3d 1169 (9th Cir. 2000), to claim that the government did not "attempt to make a showing" that he authorized Anderson to speak is particularly unfounded. Chang never raised Rule 801(d)(2)(D) in the district court and thus took "no steps toward establishing that the proffered testimony" met the requirements of the rule. *Id.* at 1176. Here, the government not only raised the Rule, it proffered, among other things, Bonds's grand jury testimony as support for its admission under it. *See* ER747-48.

authorities); Graham, *Handbook of Federal Evidence*, § 801:22 at 811-12 (6th ed. 2006) (under Rule 801(d)(2)(C), an agent's authority to speak on the subject may "be express or implied"); *see also Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 532 (3d Cir. 1976) (affirming under Rule 801(d)(2)(C) where district court had found declarant had "express or at least implied authority" to speak on subject). To evade the case law, Bonds relies on two pre-Federal Rules of Evidence Ninth Circuit cases that he believes should be "translated" as having established that "speaking authority for the authorized admissions doctrine may not be implied." AB22, 23. But while the decisions may provide support for the proposition that "the authorized admissions doctrine only applie[s] where the proponent c[an] show express authorization," they do not stand for the proposition that authority to speak cannot, as a matter of law, be implied from authority to act.

In *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), the Court had to determine whether certain out-of-court statements made by an employee were improperly admitted against the employer corporation. Rejecting the argument that the employee was authorized by the corporation to make a statement concerning the subject matter, the Court noted that "[n]o evidence was offered to establish direct written or oral authority"; instead the proponent was relying on "implied or inferred authority" to make the statements on behalf of the corporation

based on his status as a "lower echelon" employee. *Id.* at 383-85. The Court then cited the following passage from Wigmore with approval:

> [h]e who sets another person to do an act in his stead as agent is chargeable in substantive law by such acts as are done under the authority; so too, properly enough, admissions made by an agent in the course of exercizing[sic] that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself. The question therefore turns upon the scope of the authority.

Id. at 384 (citing IV Wigmore on Evidence 3rd Ed. § 1078). Although it went on to conclude that the record showed "an utter lack of proof of or any questioning seeking to establish [the employee's] authority to speak on behalf of [the employer]," *id.* at 385, it did not hold that such authority can never be implied from the authority to do an act. And by quoting the selected portion of Wigmore, the Court acknowledged that the "question" of whether the authority to act carries with it the authority to speak depends on the scope of the authority. It simply did not hold that the "authorized admissions doctrine" applies only if the proponent can demonstrate "express" speaking authority. *See also FDIC v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971) (statement of an "alleged agent" is inadmissible unless there is proof that the agent was "authorized in some way by the would-be

principle" to "'make a statement for him concerning the subject matter of the statement'") (quoting *Flintkote*, 246 F.2d at 383).

While he eventually acknowledges the other-circuit authority recognizing that authority to speak can be implied, Bonds claims that such authority is limited to "certain formal professional relationships, such as the relationship between a client and attorney." AB23. But Bonds cites only a portion of the sentence from the treatise upon which he relies. The full sentence reads "[s]ometimes speaking authority exists even though not expressly conferred *because the nature of the relationship and the task the speaker is to perform imply this result*, as is usually true in the case of attorneys, brokers and sales personnel, and persons who are given managerial or supervisory responsibilities." 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, § 8.50 at 411 (3d ed. 2007) (emphasis added). While he is correct that "trainer" is not mentioned as one of the "relationships," the label is not dispositive. Determining whether someone has authorized another to speak depends on a functional analysis of the relationship and the authorization to act, not on the label applied to the person engaged.

Consequently, that trainers may not be "generally authorized to speak for principals" (AB27, citing ER11) is beside the point. A party may authorize anyone to speak on his behalf, and whether a party did so in a particular case is

evaluated by looking at the nature of the relationship between the parties and the nature of the task authorized. *Handbook of Federal Evidence*, § 801:22 at 814 ("Authorization to make a statement concerning the subject matter may . . . be established by the acts or conduct of the principal or his statements to the agent or third party."). Authorization to deliver an item as personal as blood or urine must implicitly authorize the deliverer to identify the source, and Anderson could not deliver Bonds's samples to BALCO for testing unless he was authorized to tell BALCO whose samples they were. Otherwise, Valente would have had to guess about what to do with them, and the testing would have no value. The only logical reading of Bonds's grand jury testimony is that when he asked Anderson to deliver his samples for testing, he authorized him to identify those samples.[3] *See, e.g.*, *United States v. Iaconetti*, 540 F.2d 574, 576-77 (2d Cir. 1976) (authority to speak

[3] Bonds argues that there is doubt about whether he "authorized" Anderson to deliver his samples given that he provided blood and urine at "Anderson's behest" and that he "knew very little about what Mr. Anderson was doing with the samples." AB25. This argument is without merit. Bonds testified in the grand jury that while Anderson initially suggested the testing, he thought it was a "neat idea" because Anderson was helping him regulate his nutritional needs and that "the blood test at BALCO was just the thing to figure out what you're deficient in." ER48. He also said he "definitely" knew that BALCO was testing his urine. ER107. Stan Conte, the former Giants trainer, also testified that Bonds told him that as part of Bonds's "overall program," Bonds gave his blood to Anderson to be analyzed. ER748, 759. The record solidly establishes that Bonds authorized delivery of the samples for testing.

on principal's behalf implied where nature of the task demands it: *i.e.*, "by demanding the bribe [defendant] necessarily authorized the persons who ran the business to discuss his demand among themselves").

Bonds assumes that the government could not meet its burden unless, as the district court put it (ER11), it presented evidence that he explicitly told Anderson that he could say "This sample comes from Barry Bonds" when he delivered it. *See* AB22, 25. This is flat wrong. As Bonds acknowledges (AB12-13), the government was required to show the requisite authority by only a preponderance of the evidence. *See, e.g., United States v. Richards,* 204 F.3d 177, 202 (5th Cir. 2000). That standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602, 622 (1993) (internal quotations omitted).

Bonds's proffered grand jury transcript provided ample proof of speaking authority: it established Bonds's close "relationship" with Anderson, it established that Anderson alone was given "the task" of delivering the samples to BALCO for testing, and it established that Anderson reported back about the testing. *See, e.g.,*

ER 47-51, 71, 74, 76-77, 106-08, 143, 152-53. This evidence showed by far more than a preponderance of the evidence that Bonds authorized Anderson to identify the samples he was charged with delivering.

B. The Government Showed That Anderson Was an Agent Or Employee Within the Meaning of Rule 801(D)(2)(D)

In its opening brief the government argued that Anderson's statements were also admissible under Rule 801(d)(2)(D) because Bonds's grand jury testimony established that Anderson was acting as Bonds's agent or servant when he delivered the samples, and that identifying the samples was within the scope of his employment or agency. As proof that he was an employee, the government pointed to Bonds's testimony that Anderson was one of his three paid, "regular" trainers, he and Anderson worked together nearly every day, and Anderson gave Bonds counseling on fitness and nutritional issues. As proof that he was acting as an agent, the government showed that Bonds provided his urine and blood samples to Anderson in conjunction with Anderson's role as Bonds's trainer, and that Bonds received information about the testing through Anderson. By delivering the samples to BALCO and identifying those samples as belonging to Bonds, Anderson was thus acting as either Bonds's agent or employee. AOB36-42.

The district court rejected Rule 801(d)(2)(D) as a basis for admitting Anderson's statements because (1) the government did not cite "any evidence of the nature" of the Bonds/Anderson relationship or demonstrate that Anderson "was an employee rather than an independent contractor," and (2) "it is not evident that defendant even paid Anderson." ER12. Both of those findings are clearly erroneous because, among other things, Bonds's testimony is replete with details of their close professional association, and Bonds admitted that he paid Anderson $15,000 per year for serving as his trainer. AOB37-39.

Bonds does not address the government's clear error argument. Instead, he focuses entirely on the district court's comment that the government did not show that Anderson "was an employee rather than an independent contractor," which Bonds says is required by *Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th Cir. 1990). *See* AB28-41. Asserting that a "wall of authority" holds "that Rule 801(d)(2)(D) does not admit statements of a party's independent contractor" (AB29-31), Bonds claims the government's failure to prove Anderson was an employee and not an independent contractor was fatal. *See* AB34-35.

The parties disagree about whether *Merrick* established a categorical rule that independent contractors cannot be agents or employees under Rule 801(d)(2)(D). In the government's view, even if Anderson was technically an

"independent contractor," the record showed that he was acting as Bonds's agent when he delivered the samples to BALCO and thus his statements may be admitted under Rule 801(d)(2)(D). AOB 40-41. This view is amply supported. This Court has long recognized that "a person can be an employee for one purpose and an independent contractor for another." *Merchants Home Delivery Serv., Inc. v. NLRB,* 580 F.2d 966, 974 (9th Cir. 1978); *see Ochoa v. J.B. Martin & Sons Farms, Inc.,* 287 F.3d 1182, 1189 (9th Cir. 2002) ("the categories 'independent contractor' and 'agent' are not mutually exclusive"); *Dearborn v. Mar Ship Operations, Inc.,* 113 F.3d 995, 998 n.3 (9th Cir. 1997) ("[A]n independent contractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for the principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf.") (citation omitted); *see also Metro-Goldwyn-Mayer Studio v. Grokster, Ltd .,* 454 F. Supp. 2d 966, 973-74 (C.D. Cal. 2006) ("statement is admissible under Rule 801(d)(2)(D) so long as it is made by an agent within the scope of agency, regardless of the precise contractual relationship between the agent and the party against whom the evidence is offered"). As the government asserted in its opening brief, the district court thus overstated the

holding of *Merrick* when it wrote that "[i]n the Ninth Circuit, independent contractors do not qualify as agents for purposes" of Rule 801(d)(2)(D). ER11.

Citing treatises, Bonds claims that the district court was right when it held that independent contractors cannot be "agents" because Rule 801(d)(2)(D) "was not intended to extend evidence law beyond the substantive law," and "[a]s a matter of substantive law, employers are not liable for the torts of independent contractors" (AB33, emphasis omitted; *see* AB29 n.10). But even the treatises upon which Bonds relies recognize that the "independent contractor limitation" is not a hard and fast rule. *See Federal Evidence* § 8:54 at 442 (there are "many exceptions[] under which a tort by an independent contractor does produce liability for the person who hired him"); *see also* Restatement (Second) Agency, § 2 cmt. b (1958) ("[a]n agent who is not a servant is . . . an independent contractor when he contracts to act on account of the principal"). Bonds also claims that the cases the government cited offer no "justification for abrogating the independent contractor limitation." AB31. Bonds's criticism erroneously presupposes the existence of a categorical rule, and it wrongly presumes that his cited cases justify the existence of the limitation. But of the federal appellate cases Bonds cites, one relies on *Merrick* as the sole source of the "independent contractor limitation," and

five others either make no mention of the "independent contractor limitation," or apply it without any analysis.[4]

Even if the court correctly concluded that independent contractors cannot be agents or employees for purposes of the Rule, it erred in finding that the record established that Anderson may be an independent contractor rather than an employee. Bonds is correct that whether someone is an employee is governed by federal, not state, law. *See* AB35-36. But even under the ten-factor test he cites

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[4] *See, e.g., Lippay v. Christos*, 996 F.2d 1490, 1499 (3d Cir. 1993) (citing *Merrick* as sole support in fact-specific holding that government informant's statements inadmissible because he "seem[ed] to function as a sort of independent contractor" rather than agent or employee); *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 238 (2d Cir. 2006) (court opts not to decide whether district court erred by admitting statement of alleged "independent contractor"); *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1335-36 (10th Cir. 1996) (statement properly excluded where proponent "neither pleaded nor proved an agency relationship" -- independent contractor limitation never mentioned); *American Eagle Ins. Co. v. Thompson*, 85 F.3d 327, 333 (8th Cir. 1996) (proponent failed to demonstrate any relationship between principal and declarant -- independent contractor limitation never mentioned); *Murrey v. United States*, 73 F.3d 1448, 1456 (7th Cir. 1996) (statements of physicians retained as outside auditors "probably weren't any other kind of agent" of employer -- independent contractor limitation never mentioned); *Sanford v. Johns-Manville Sales Corp.*, 923 F.2d 1142, 1149-50 n.18 (5th Cir. 1991) (physician who examined another doctor's patient was "possibly an independent contractor" because he had undertaken "to do a special piece of work for another using his own means and methods without submitting himself to the control of the other," and record did not otherwise show agency relationship); *see also Coleman v. Wilson*, 912 F. Supp. 1282, 1296 (E.D. Ca. 1995) (citing *Merrick* as sole support for proposition that independent contractor statements are inadmissible).

for determining "whether one acting for another is a servant or an independent contractor" (*see* AB36-37), the record showed overwhelmingly that Anderson was acting as Bonds's servant and not as an independent contractor when he delivered the samples to BALCO.

Specifically, the parties agree – and the court found undisputed (ER12) – that Anderson was a personal trainer by profession, and Bonds testified that he worked out with Anderson every day, that Anderson traveled to the ballpark every day, and that Anderson would even travel to meet and train with Bonds every other weekend, ER68, 92-93, evidence that the work was ordinarily done at Bonds's direction (factor (c)). Bonds testified that he used several trainers to keep him in shape to play baseball and that he decided to use Anderson because he liked Anderson's philosophy, ER44-48, evidence of the "skill required in the particular occupation" (factor (d)). Anderson had been Bonds's trainer for years and was still his trainer at the time he testified, ER44-45, 116, evidence of "the length of time for which the person is employed" (factor (f)). Bonds paid Anderson $15,000 per year to train him, just as he paid his other trainers, and even gave him a $20,000 cash bonus the year he hit 73 home runs, ER77, 92, 164, 170, evidence of "the method of payment" (factor (g)). Bonds testified that Anderson was one of his several trainers, that he trained with Anderson every day, and that

Anderson advised him on his nutrition, ER44-48, evidence that Anderson's work was part of Bonds's "regular business" (factor (h)). *See Ochoa*, 287 F.3d at 1191 ("[a] court is not likely to classify someone as an independent contractor when the work is part of another's regular business"). Bonds made it abundantly clear that he considered playing baseball a "business," ER63 (factor (j)).

As for "the extent of control which, by agreement, the master may exercise over the details of the work" (factor (a)), Bonds testified that his trainers "worked" for him, *see* ER60, that he switched trainers to work with Anderson because he wanted "another coach" to push his body "to another level," and he purposely split his training among several coaches. ER45-46, 170. Bonds had Anderson travel to him to train on "[e]very other weekend." ER92-93. Regarding the "control" Bonds exercised over how the blood and urine samples were produced and delivered, Bonds had Anderson come to his house to pick them up, and Bonds only allowed his doctor to draw blood and only let Anderson deliver his blood and urine samples to BALCO. ER50, 143, 152-53. Under an independent contractor vs. employee/agent test, Anderson was acting as Bonds's employee/agent when he delivered the samples.

Finally, Bonds relies on his testimony describing his relationship with Anderson as one of "friendship" as evidence that he did not consider Anderson to

be an "employee." AB37-39. But while the parties' view of their relationship is one of the ten factors, it is not dispositive. *See Ochoa*, 287 F.3d at 1192 ("'[i]t is not determinative that the parties believe or disbelieve that the relation of [independent contractor or] master and servant exists'") (*quoting* Restatement (Second) of Agency § 220 cmt. m (1957)). This is particularly true where, as here, Anderson was acting solely in Bonds's interest when he delivered the samples for testing. *See United States v. Shunk*, 881 F.2d 917, 921 (10th Cir. 1989) (defendant's statements to authorities confirmed that his brother was acting as his agent when he told undercover officer that the weapon his brother was seeking to sell belonged to defendant).

C. Anderson's Statements Are Indisputably Trustworthy

In its opening brief the government argued that the district court abused its discretion in refusing to admit Anderson's statements under Rule 807 by (1) failing to treat the rule as a rule of inclusion; and (2) clearly erring in how it determined that Anderson's statements were untrustworthy. AOB42-52. Bonds responds that (1) the government wrongly claims that the district court was "required" to admit the statements under the Rule; (2) Anderson's unavailability cannot alone justify admitting the statements; and (3) the government's proffer did not establish trustworthiness. AB43-46, 47. These arguments should be rejected.

First, the government acknowledged that the district court's decision to admit evidence, including Anderson's statements under Rule 807, is a discretionary one. *See* AOB25-26, 52. The government argued that the district court misconstrued the scope of the rule and misapprehended the "trustworthiness" test, and that the district court was required to exercise its discretion *properly* in declining to admit the evidence. Its failure to do so requires reversal.

Second, the government nowhere claimed that Anderson's unavailability in and of itself meant that the district court had to admit his statements. *See* AB45-46. Rather, the government's arguments were directed at its burden to show that admission of the statements served "[t]he general purposes of the Federal Rules and the interests of justice," one of the enumerated factors the court was required to weigh when deciding whether to admit the statements under the residual exception. *See Fong v. American Airlines, Inc.,* 626 F.2d 759, 763 n.3 (9th Cir. 1980). On that front, the government argued that given Anderson's unavailability as a witness for the government, the importance of this evidence, and the trustworthiness of Anderson's statements, this was an "exceptional circumstance" that justified admission of the statements under Rule 807.

Third, while he acknowledges that analysis of the "trustworthiness element" is "fact-specific" (AB49), Bonds never actually defends the district court's factual

findings on this "most important" factor of the five-factor test. AB47. The district court never addressed "the totality of circumstances that surround[ed] the making of the statement and that render[ed] the *declarant* particularly worthy of belief." *Idaho v. Wright,* 497 U.S. 805, 820-21 (1990) (emphasis added). Instead, the district court found Anderson's statements lacked guarantees of trustworthiness because *Valente* once "mislabeled" one of his blood samples, and *Valente* testified in the grand jury that Bonds never consulted with a "Dr. Goldman," who was "the medical director of BALCO" and who Valente identified on letters to Quest as the source of the request for testing on Bonds's samples. ER9-10. As explained in the opening brief (AOB49-50), those facts have nothing to do with the trustworthiness of *Anderson's* statements, and Bonds nowhere rebuts that the court focused on the wrong question, *i.e.*, on Valente's handling of the samples rather than the trustworthiness of Anderson's statements identifying those samples. Valente will testify at trial, and thus all of his statements and his conduct vis-a-vis the samples will be subject to cross-examination.

The only part of the district court's order that Bonds defends is its view that trustworthiness was lacking because the statements were not videotaped, drawn from prior testimony, or contained in "a formal and official government document." AB48-49. But there is simply no requirement that statements,

especially non-testimonial statements, be recorded or contained in a document to be admissible under Rule 807.

It is not surprising that Bonds fails to identify anything in the record undercutting the trustworthiness of these statements because there is nothing. Bonds gave his trusted personal trainer his blood and urine samples to take to BALCO for testing. Bonds's hand-chosen doctor will corroborate that each time he drew blood from Bonds he gave the samples to Anderson to deliver to BALCO for testing, all at Bonds's direction. Valente will testify that Anderson brought in blood and urine samples and identified them as belonging to Bonds. The blood samples went from Bonds to Dr. Ting to Anderson to Valente, and the urine samples from Bonds to Anderson to Valente. There are no gaps here. Nothing in the record suggests that Anderson's statements identifying the samples were lies or mistakes, and the record contains ample evidence showing that they were true. *See United States v. George*, 960 F.2d 97, 100 (9th Cir. 1992) (lack of a motive to fabricate weighs heavily in favor of a finding of trustworthiness). The district court's contrary finding was based on a misunderstanding of Rule 807 and an erroneous focus on Valente's conduct. It should be reversed.

II. THE BALCO LOGS ARE ADMISSIBLE WITHOUT ANDERSON'S STATEMENTS

The government argued that the BALCO log sheets showing which urine samples came from Bonds and the corresponding lab test results for those samples were admissible as business records without Anderson's statements. AOB53-56. The district court rejected the government's argument, saying in pertinent part:

> The government's proffer is that Valente will testify that he recorded certain samples as being defendant's urine based on Anderson's statement that the samples were from defendant. Gov't Opp., at 31. Accordingly, even if these documents qualify as business records, they are not relevant because the government cannot link the samples to defendant without Anderson's testimony.

ER12. On appeal, the government argues that that ruling is wrong because the BALCO log sheets are relevant on their face. AOB53-55. Bonds says, "[n]o one denies that the documents are relevant if they are authentic," AB52, but argues that the district court excluded them because the government could not "authenticate" the log sheets without Anderson's testimony confirming that he told Valente that these samples came from Bonds. AB53.

Like the district court, Bonds misstates the government's burden in demonstrating the relevance of the BALCO log sheets. The foundational "requirement of authentication or identification as a condition precedent to

admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a); *see United States v. Harrington,* 923 F.2d 1371, 1374 (9th Cir. 1991). To meet its burden, "[t]he government need only make a prima facie showing of authenticity, as '[t]he rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.'" *United States v. Black,* 767 F.2d 1334, 1342 (9th Cir. 1985) (quoting 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 901(a) [01], at 901-16 to -17 (1983)).

Here, the government will introduce Bonds's grand jury testimony confirming that, during the relevant time frame, he gave Anderson urine samples to deliver to BALCO for testing. Valente will testify that, in the normal course of business, he recorded the source of the urine sample when he received it, and that he assigned it a number before sending it out to a lab to be tested. This system allowed Valente to match the samples with the results he later received. There is no doubt that the log is what it purports to be – Valente's record of the urine samples he received and that he sent out for testing. The log sheets are thus readily "authenticated" without Anderson's statements.

As to chain of custody, Bonds can cross-examine Valente about whether he verified the information he wrote down, and the jury may ultimately conclude that the government did not prove that urine samples recorded in the logs actually came from Bonds. But that fact does not render the log sheets themselves irrelevant or inauthentic. *See, e.g.*, *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527, 2532 n.1 (2009) ("it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case"); *United States v. Soulard*, 730 F.2d 1292, 1298 (9th Cir. 1984) ("once adequate foundational showings of authenticity and relevancy have been made, the issue of completeness then bears on the Government's burden of proof and is an issue for the jury to resolve"); *United States v. Goichman*, 547 F.2d 778, 784 (3d Cir. 1976) ("there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility . . . it is the jury who will ultimately determine the authenticity of the evidence, not the court"). Valente will testify that the BALCO log is what it purports to be, a record of the urine samples he received and sent out for testing.[5] The log identifies Bonds as the source of urine samples that

[5] To the extent that Bonds is claiming (at 52-53) that the documents are not business records because they contain inadmissible hearsay (*i.e.*, Bonds's name is in the log because Anderson identified the samples), that was not the basis of the

tested positive for steroids. The district court thus clearly erred when it ruled that the government "cannot" link the samples to Bonds without Anderson's testimony. While the government's ability to make that link is more difficult without Anderson, it is by no means impossible. Sufficient evidence, including Bonds's admissions, establishes that the samples belonged to Bonds.

CONCLUSION

For the foregoing reasons, the district court's ruling excluding Anderson's statements to Valente identifying Bonds's samples, the BALCO log sheets, and the drug test results should be reversed.

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Respectfully submitted,

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district court's ruling. The district court assumed that the documents were business records and merely ruled that they were irrelevant.

STATEMENT OF RELATED CASES

There are no related cases pending in this circuit.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Circuit Rule 32-1

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more and contains 6,813 words.

Date: August 14, 2009

/s/
Barbara J. Valliere
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid , or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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