ARE NEW SEALED FILINGS IN BARRY BONDS APPEAL MORE DIRTY TRICKS BY DOJ? UPDATE: YES!

The handling of the BALCO series of investigations, both by lead investigator Jeff Novitsky and the US Attorneys office, has been relentlessly aggressive and marked by dubious, at best, tactics. Considering that the DOJ, during the entire time period, could not find the resources to prosecute the banksters who brought down the entire economy, BALCO was one of the most hideous wastes of taxpayer money imaginable.

Remarkably, the questionable tactics by DOJ may well be raising their ugly head yet again. Bonds' appeal in the 9th Circuit is a somewhat mundane legal issue that has been fully briefed on the *en banc* petition for the better part of a year. The *en banc* hearing, before KOZINSKI, Chief Judge; and REINHARDT, O'SCANNLAIN, GRABER, WARDLAW, W. FLETCHER, RAWLINSON, CALLAHAN, N.R. SMITH, NGUYEN and FRIEDLAND, Circuit Judges is set for 2:00 pm tomorrow, Thursday September 18, 2014

Yet, less than 48 hours before the *en banc* rehearing is scheduled to commence, the DOJ has suddenly, and mysteriously, lodged sealed filings at 8:00 pm last night. These are Docket Numbers 64 and 65 respectively:

> Filed UNDER SEAL Appellee USA motion to file a letter to the court under seal (PANEL). Deficiencies: None. Served on 09/16/2014. [9242886] (JFF)
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> Filed UNDER SEAL Appellee USA letter dated 09/16/2014 re: constructive amendment argument. (PANEL) Paper filing deficiency: None. [9242910] (JFF)

Here is Bonds' Petition for Rehearing En Banc. Here is the previous panel decision in the 9th Circuit. If you don't want to bother with the full pleadings, this article from the Orange County Breeze gives a nice synopsis of the scope of the en banc proceeding for Bonds.

As can quickly be discerned, the appeal centers really on common statutory interpretation as applied to the facts in the public trial record. The issue is whether there was sufficient evidence to convict Bonds because his statement describing his life as a celebrity child – in response to a question asking whether his trainer ever gave him any self-injectable substrances – was evasive, misleading, and capable of influencing the grand jury to minimize the trainer's role in the distribution of performance enhancing drugs, and whether, under the law, that can properly constitute obstruction. I wrote an extensive piece arguing the weakness and infirmities of the verdict at the time it was handed down by the jury. Which is when the jury also acquitted Bonds of all the substantive underlying perjury counts.

Yes, the appeal is really that simple. So why, pray tell, does the DOJ need to be interjecting last minute sealed documents? What possible need could there be for anything to be sealed for this mundane criminal appeal? There may be a valid explanation, but it is nearly impossible to fathom what it could be.

I am willing to bet Bonds' attorneys, Allen Ruby and Dennis Riordan, must be apoplectic.

UPDATE: Well well, I am sitting in Alice Cooperstown having lunch, waiting for my preliminary hearing to reconvene, and Josh Gerstein just sent me the answer to the question of this post. YES! Indeed the sealed filings are a slimy last minute trick pulled by the DOJ. DOJ was trying to insert grand jury testimony from the aforementioned government BALCO investigator, Jeff Novitsky, into the appeal when it has never, at any point of the proceedings, whether in the trial court or 9th

Circuit, been part of the record or indictment.

Here is the responsive pleading just filed by Bonds' attorney Dennis Riordan. Here is the pertinent part:

> The grand jury transcripts referred to in the government's motion and letter are not part of the record on appeal. Had they been before the district court in any form, the proper method of adding them to the appellate record would have been by means of a timely motion to correct or modify the record under Rule 10(e) of the Federal Rules of Appellate Procedure. The transcripts which are the subject of the government's motion, however, were never placed before the district court in either pretrial, trial, or post-trial proceedings. Notably, the declaration of AUSA Merry Jean Chan which accompanies the government's motion makes no claim that the transcripts were filed with the district court. "Papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. 1988) (citing, inter alia, United States v. Walker, 601 F.2d 1051, 1054–55 (9th Cir.1979)).
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> Should the Court nonetheless wish to consider the transcripts in question, they fully support Mr. Bonds's argument that the district court constructively amended the indictment by instructing on "Statement C" as a basis for conviction on the Count Five obstruction count, although that statement was not contained in the indictment. In his testimony, in discussing Statement C, then labeled "Statement F" before the grand jury, Novitsky admitted that Mr. Bonds had responded to the pending

> question—"Did Greg ever give you anything that required a syringe to inject yourself with?"—with a "denial" before veering off into a digression about "being a celebrity child." (RT of February 3, 2011, at 110.) Novitsky's admission that the prosecutor's question was in fact answered by Mr. Bonds constituted a good reason why the grand jury would not have relied on Statement C in indicting on the obstruction charge. The only manner of accurately ascertaining whether a grand jury relied on an act in indicting is by the inclusion of that act in the indictment itself. Here, Statement C was expressly excised from the indictment by the use of asterisks. See Appellant Bonds's Petition for Rehearing En Banc, at 16.

Hilarious. DOJ tries a patently inappropriate punk move and Dennis Riordan turns it around to bite them in the butt. Quite well deserved. You have to hand it to the DOJ in the BALCO cases, they are nothing if not consistently ethically dubious.