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14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**
 16 **SAN FRANCISCO DIVISION**

17 UNITED STATES OF AMERICA,)	Case No. CR 07 0732 SI
)	
18 Plaintiff,)	DEFENDANT’S MEMORANDUM ON
)	THE ADMISSIBILITY OF GREG
19 vs.)	<u>ANDERSON’S REFUSAL TO TESTIFY</u>
)	
20 BARRY LAMAR BONDS,)	
)	
21 Defendant.)	
)	

22 **INTRODUCTION**

23
 24 Greg Anderson has refused to testify at Mr. Bonds’s trial. The government previously
 25 indicated to the Court that it will seek to place before the jury Anderson’s silence, either by
 26 having Anderson refuse to testify in front of the jury, or by introducing other evidence of that
 27 refusal. The government apparently intends to argue that the jury can infer that Anderson’s
 28 refusal constitutes an implied admission that his testimony would have been harmful to Mr.

1 Bonds.

2 As explained below, evidence of the Anderson refusal is plainly inadmissible under the
3 Confrontation Clause and the ban on hearsay contained in the Federal Rules of Evidence. Were
4 it not, its exclusion would still be mandated by Rule 403's prohibition on the admission of
5 evidence of little probative value whose admission would result in a waste of the Court's time.

6 **A. The Confrontation Clause Barrier**

7 As to calling Anderson before the petit jury, as the Supreme Court made clear in *Douglas*
8 *v. Alabama*, 380 U.S. 415 (1965), the government's tactic would violate the Confrontation
9 Clause. In fact, this case is squarely controlled by *Douglas*, where a co-defendant named Loyd
10 was called by the state to testify against the defendant. Loyd had already been tried and found
11 guilty, so he had no valid claim of privilege. Despite threatened contempt sanctions, he
12 nonetheless persisted in his refusal to testify. *Id.* at 416-17 & n.1.

13 In the presence of Douglas's jury, the prosecutor called Loyd to the stand, and asked him
14 a series of questions, which Loyd refused to answer. The Supreme Court held that such a tactic
15 violates the Confrontation Clause. *Id.* at 420 ("Loyd could not be tested by cross-examined on a
16 statement imputed to but not admitted to him.") Critically, the Court held that Douglas's
17 Confrontation Clause rights were violated regardless of the invalidity of Loyd's privilege claim.
18 *Id.* at 420 ("We need not decide whether Loyd properly invoked the privilege in light of his
19 conviction.")

20 Two years earlier, the Court had held that prosecutorial misconduct occurs "when the
21 Government makes a conscious and flagrant attempt to build its case out of inferences arising
22 from use of the testimonial privilege." *Namet v. United States*, 373 U.S. 179, 186 (1963).
23 *Douglas* then held that the same problem can arise even where the witness does not have a valid
24 claim of privilege. Lower courts have repeatedly reiterated the same point since. As the Tenth
25 Circuit put it, "Misconduct may yet arise if the prosecution continues to question a witness once
26 her consistent refusal (*legitimate or otherwise*) to testify has become apparent." *United States v.*
27 *Torrez-Ortega*, 184 F.3d 1128, 1137 (10th Cir. 1999) (emphasis added).

28 The Confrontation Clause guarantees a defendant's right to cross-examine witnesses

1 against him. When a government witness refuses to answer questions, the defendant is unable to
2 exercise his rights. See *United States v. Owens*, 484 U.S. 554, 561-62 (1988). When the
3 prosecution calls a witness to the stand knowing he will not testify, it commits misconduct.
4 Thus, if the government is aware that Anderson will not testify, it may not call him to the stand.

5 **B. Admissions by Silence and Hearsay**

6 The government fares even worse if it attempts to place in evidence Mr. Anderson's
7 having refused to testify outside the presence of Mr. Bonds' petit jury, either before the grand
8 jury or at a hearing before this Court. The government's theory would be that by refusing to
9 answer questions, Anderson implicitly admitted guilt, both his own and Mr. Bonds's. But that
10 theory relies on a hidden hearsay inference, because silence is a form of assertive nonverbal
11 conduct, which is included in the definition of hearsay. See Fed. R. Evid. 801(a)(2) and (c); see
12 also *McCormick on Evidence* § 264 (discussing the doctrine of "admissions by silence" as
13 hearsay).

14 There is, of course, a hearsay exclusion for admissions by silence: Rule 801(d)(2)(B).
15 That provision states that if a party adopts a statement of another, that statement can be admitted
16 against the party. Case law demonstrates that in certain circumstances, a party may manifest
17 belief in a statement, and thus adopt it, by silence. See *United States v. Schaff*, 948 F.2d 501,
18 505 (9th Cir. 1991).

19 But 801(d)(2)(B) does not apply here for two reasons. First, by its plain terms,
20 801(d)(2)(B) covers only admissions by the party himself — it does not allow admissions by
21 silence of a third party to be admitted against a party. Second, the Ninth Circuit has held that
22 801(d)(2)(B) does not cover the failure to testify in grand jury proceedings. "[D]eclining an
23 invitation to testify in front of the grand jury simply does not constitute an admission by
24 silence." *United States v. Hove*, 52 F.3d 233, 237 (9th Cir. 1995), overruled on other grounds by
25 *Roy v. Gomez*, 81 F.3d 863, 866 (9th Cir. 1996)).

26 An out-of-court admission by silence is a form of hearsay. Evidence that Anderson
27 refused to cooperate with the government's investigation, if offered to prove that his silence
28 constituted an admission of either his culpability or his desire to assist Mr. Bonds, is hearsay. It

1 is not admissible under Rule 801(d)(2)(B) or any other hearsay exclusion or exception. It is
2 therefore inadmissible under Rule 802.¹

3 **C. Rule 403**

4 The time required for the presentation of all evidence concerning Anderson's refusal
5 must be weighed against the probative value of the refusal, which is minimal. As the Supreme
6 Court has held, "In most circumstances silence is so ambiguous that it is of little probative
7 force." *United States v. Hale*, 422 U.S. 171, 176 (1975); *see also Doyle v. Ohio*, 426 U.S. 610,
8 617 (1976) ("every post-arrest silence is insolubly ambiguous . . .").

9 As with other contentions it has made concerning Anderson and his purported hearsay
10 statements, the government's claim for the admission of Anderson's refusal to testify will be
11 fueled by its faith in the rectitude of its position. In the government's view, Anderson's silence
12 proves that his testimony would incriminate Mr. Bonds because there can be no other
13 explanation, reasonable or otherwise, for Anderson's obduracy. Mr. Bonds would not have been
14 charged were he innocent, and thus the refusal of a witness like Anderson to testify in support of
15 the government's case can only be explained by a desire to protect the guilty.

16 Contrary to the government's view of its case, there are clearly alternative inferences that
17

18 ¹ Nor can the government argue that Anderson is a "missing witness" as to whom it may
19 argue an inference adverse to the defendant. *See Graves v. United States*, 150 U.S. 118, 121
(1893); *See Ninth Circuit Model Criminal Jury Instructions* 4.16.

20 The adverse inference from a missing witness may only be drawn against a party only if
21 "the witness is peculiarly within the party's control." *United States v. Noah*, 475 F.2d 688, 691
22 (9th Cir. 1973). The government has the power to call Anderson — his evidence is not
23 "peculiarly within the power" of the defendant. *See United States v. Brutzman*, 731 F.2d 1449,
1454 (9th Cir. 1984) ("Where a witness' unavailability results from an invocation of the
privilege against self-incrimination, the witness is unavailable to both parties, and the court's
refusal to give an absent witness instruction is proper.").

24 Moreover, "the law never imposes on a defendant in a criminal case the burden or duty of
25 calling any witnesses or producing any evidence." *United States v. Tisor*, 96 F.3d 370, 377 n.9
26 (9th Cir. 1996) (quoting the standard "missing witness" instruction, from 1 Devitt and Blackmar,
Federal Jury Practice and Instructions § 14.15 (4th ed. 1992)).

27 In short, under well-settled Ninth Circuit law, the government is not entitled to argue an
28 adverse "missing witness" inference against Mr. Bonds based on Mr. Anderson's refusal to
testify.

1 could be drawn reasonably from Anderson's silence. Anderson no doubt feels abused by the
2 government's treatment of him and his family, including his own lengthy incarceration and the
3 threats to imprison his wife and mother in law. That being so, he may distrust the prosecution's
4 willingness to accept even truthful testimony on his part that does not conform to the
5 government's theory of the case. He may conclude that the risk of a contempt citation is better
6 than the risk of a bad faith perjury prosecution. Or it may well be that while his testimony would
7 assist Mr. Bonds, Anderson's hatred of the government at this point in his mind outweighs
8 whatever good he could do for his former client.

9 If the government were permitted to place Anderson's refusal to testify before the jury in
10 order to argue the inference it favors, Mr. Bonds would certainly be entitled to introduce the
11 evidence that supports a different explanation for Anderson's silence. That evidence
12 encompasses the government's harassment of Anderson's family, which, according to press
13 accounts, included sending an undercover agent to surreptitiously record workout sessions with
14 Mr. Anderson's wife, who is a personal trainer. The resulting "mini-trial" concerning the
15 collateral matter of Anderson's motivation would dwarf the real issues before the Court.

16 CONCLUSION

17 For the reasons stated above, the prosecution should be precluded from introducing
18 evidence of Mr. Anderson's refusal to testify.

19 Dated: February 27, 2009

Respectfully submitted,

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