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

18 UNITED STATES OF AMERICA, ) Case No. CR 07 0732 SI  
19 )  
Plaintiff, ) **DEFENDANT’S MOTION TO BAR**  
20 ) **EVIDENCE OF GREG ANDERSON’S**  
vs. ) **REFUSAL TO TESTIFY AND**  
21 ) **SUPPORTING MEMORANDUM**  
BARRY LAMAR BONDS, )  
22 )  
Defendant. ) Date: February 11, 2011  
Time: 11:00 a.m.  
23 ) Judge: The Honorable Susan Illston

24 **INTRODUCTION**

25 This matter was set for trial in the first week of March of 2009. At that time, Greg  
26 Anderson refused to testify at Mr. Bonds’s trial, and the Court excluded certain evidence  
27 because, absent Anderson’s testimony, the government could not lay the necessary foundation for  
28 the admission of the evidence in question. The government appealed that ruling on February 27,

1 2009.

2 Prior to the filing of its notice of appeal, the government had indicated to the Court that it  
3 would seek to place before defendant's jury evidence of Anderson's silence, either by having  
4 Anderson refuse to testify in front of the jury, or by introducing other evidence of that refusal.  
5 The government apparently intended to argue that the jury could infer that Anderson's refusal  
6 constituted an implied admission that his testimony would have been harmful to Mr. Bonds. On  
7 February 27<sup>th</sup>, counsel for Mr. Bonds filed a motion to exclude such evidence, but the motion  
8 was mooted by the government's filing of a notice of appeal on the same day. Mr. Bonds now  
9 resubmits that motion.

10 As explained below, any attempt to call Anderson before the jury at trial is barred by  
11 Supreme Court authority on all fours with the present case. Evidence of Anderson's out-of-court  
12 refusals is plainly inadmissible under the Confrontation Clause and the ban on hearsay contained  
13 in the Federal Rules of Evidence. Were it not, its exclusion would still be mandated by Rule  
14 403's prohibition on the admission of evidence of little probative value whose admission would  
15 result in a waste of the Court's time.

16 **A. Calling Anderson Is Barred by the Confrontation Clause**

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

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

1 conviction.”)

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

10 The Confrontation Clause guarantees a defendant’s right to cross-examine witnesses  
11 against him. When a government witness refuses to answer questions, the defendant is unable to  
12 exercise his rights. See *United States v. Owens*, 484 U.S. 554, 561-62 (1988). When the  
13 prosecution calls a witness to the stand knowing he will not testify, it commits misconduct.  
14 Thus, if the government is aware that Anderson will not testify, it may not call him to the stand.

#### 15 **B. Out-of-Court Admissions by Silence and Hearsay**

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

24 There is, of course, a hearsay exclusion for admissions by silence: Rule 801(d)(2)(B).  
25 That provision states that if a party adopts a statement of another, that statement can be admitted  
26 against the party. Case law demonstrates that in certain circumstances, a party may manifest  
27 belief in a statement, and thus adopt it, by silence. See *United States v. Schaff*, 948 F.2d 501, 505  
28 (9th Cir. 1991).

1 But 801(d)(2)(B) does not apply here for two reasons. First, by its plain terms,  
2 801(d)(2)(B) covers only admissions by the party himself — it does not allow admissions by  
3 silence of a third party to be admitted against a party. Second, the Ninth Circuit has held that  
4 801(d)(2)(B) does not cover the failure to testify in grand jury proceedings. “[D]eclining an  
5 invitation to testify in front of the grand jury simply does not constitute an admission by silence.”  
6 *United States v. Hove*, 52 F.3d 233, 237 (9th Cir. 1995), overruled on other grounds by *Roy v.*  
7 *Gomez*, 81 F.3d 863, 866 (9th Cir. 1996)).

8 An out-of-court admission by silence is a form of hearsay. Evidence that Anderson  
9 refused to cooperate with the government’s investigation, if offered to prove that his silence  
10 constituted an admission of either his culpability or his desire to assist Mr. Bonds, is hearsay. It  
11 is not admissible under Rule 801(d)(2)(B) or any other hearsay exclusion or exception. It is  
12 therefore inadmissible under Rule 802.<sup>1</sup>

### 13 C. Rule 403

14 The time required for the presentation of all evidence concerning Anderson’s refusal must  
15 be weighed against the probative value of the refusal, which is minimal. As the Supreme Court  
16 has held, “In most circumstances silence is so ambiguous that it is of little probative force.”

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18 <sup>1</sup> 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 *United States v. Hale*, 422 U.S. 171, 176 (1975); *see also Doyle v. Ohio*, 426 U.S. 610, 617  
2 (1976) (“every post-arrest silence is insolubly ambiguous . . .”).

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

10 Contrary to the government’s view of its case, there are clearly alternative inferences that  
11 could be drawn reasonably from Anderson’s silence. Anderson may feel abused by the  
12 government’s treatment of him and his family, including his own lengthy incarceration and the  
13 threats to imprison his wife and mother in law. If so, he may distrust the prosecution’s  
14 willingness to accept even truthful testimony on his part that does not conform to the  
15 government’s theory of the case. He may conclude that the risk of a contempt citation is better  
16 than the risk of a bad faith perjury prosecution. Or it may well be that while his testimony would  
17 assist Mr. Bonds, Anderson’s opinion of the government at this point in his mind outweighs  
18 whatever good he could do for his former client.

19 If the government were permitted to place Anderson’s refusal to testify before the jury in  
20 order to argue the inference it favors, Mr. Bonds would certainly be entitled to introduce the  
21 evidence that supports a different explanation for Anderson’s silence. That evidence  
22 encompasses the government’s harassment of Anderson’s family, which, according to press  
23 accounts, included sending an undercover agent to surreptitiously record workout sessions with  
24 Mr. Anderson’s wife, who is a personal trainer. The resulting “mini-trial” concerning the  
25 collateral matter of Anderson’s motivation would dwarf the real issues before the Court.

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**CONCLUSION**

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

Dated: January 7, 2011

Respectfully submitted,

LAW OFFICES OF ALLEN RUBY

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