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February 11, 2013

Molly C. Dwyer
Clerk of the Court
Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

Re: *United States v. Bonds*, Ninth Cir. No. 11-10669
Response to United States' Citation of Supplemental Authority
(Fed.R.App.Pro. 28[j])

Dear Ms. Dwyer:

This matter is scheduled for oral argument before Judges Murguia, Hawkins, and Schroeder this Wednesday, February 13th.

On February 5th, the government submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j), citing cases that it claims constitute “pertinent and significant authority that supports the government’s position” in this matter. One of those cases, *United States v. Chao Fan X*, –F.3d –, 2013 WL 28392 (9th Cir. Jan. 3, 2013), has no factual similarity to this matter and merits no comment.

The government cites a second case—*United States v. Manning*, – F.3d –, 2012 WL 5871715 (9th Cir. Nov.21, 2012)—for the proposition that a “defendant’s false story to a pretrial services officer was material [to an obstruction of justice sentencing enhancement] even though the defendant later confessed [a week later] to the truth.” The government thereby suggests that under *Manning*, a lie before the grand jury constitutes obstruction of justice under section 1503 regardless of whether and when it was later corrected. Mr. Bonds was not charged or convicted with testifying falsely in Statement C, the sole basis for his conviction. This point aside, the third case cited by the government—*United States v. Wiggan*, 700 F.3d 1204 (9th Cir. 2012)—wholly undermines the government’s reliance on *Manning*.

Wiggan reversed the defendant's perjury conviction due to evidentiary error. In doing so, this Court noted that a timely recantation of false testimony before the same grand jury that heard the falsehood bars a perjury prosecution, citing 18 U.S.C. section 1623(d). Similarly, even a flat refusal to answer a grand jury question cannot be prosecuted as criminal contempt unless and until a judge directs the witness to answer, and he refuses. *Brown v. United States*, 359 U.S. 41, 50 (1959) (Witness entitled to "persist in his refusal [to answer a grand jury question] until the court ordered him to answer.")

The government's contention that Mr. Bonds could be convicted for obstruction of justice for digressing for a matter of seconds before giving a direct answer to a grand jury question has no basis in fact or law.

Sincerely,

/s/ Dennis P. Riordan
Dennis P. Riordan

Attorney for Defendant-Appellant
BARRY LAMAR BONDS

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I hereby certify that on February 11, 2013, 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.

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Signature: /s/ Jocilene Yue
Jocilene Yue

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Jocilene Yue