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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
DONALD J. PEEL,  
  
Defendant.

No. 2:14-cr-00192-GEB

**ORDER DENYING DEFENDANT'S MOTION  
IN LIMINE\***

On November 5, 2014, the day trial commenced, Defendant filed a motion in limine seeking to exclude "recorded jail telephone calls between Mr. Peel and [witness] Nicole Gorski." (Def.'s Mot. in Limine ("MIL") 1:17-19, ECF No. 106.) Specifically, Defendant seeks to preclude the portions of the recorded telephone calls in which "Mr. Peel discusses with Nicole Gorski his efforts to have Ms. Gorski marry him so that she can invoke the marital privilege." (Id. at 1:22-24.) Defendant argues such evidence is irrelevant and should be excluded under Federal Rule of Evidence ("FRE") 403. (Id. at 1:25-2:21.) Defendant contends:

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\* This matter is suitable for decision without oral argument.

1 Here, whether or not Mr. Peel wanted Ms.  
2 Gorski to marry him so that an argument could  
3 be made that she had a right to invoke the  
4 marital privilege is not relevant to any of  
5 the elements of the offense with which Mr.  
6 Peel is charged. Obviously, as a criminal  
7 defendant, Mr. Peel has had an interest in  
8 developing a litigation strategy that will  
9 help him at trial, but his efforts to do that  
10 by trying to creatively use or expand a  
11 historically recognized privilege are not  
12 relevant to any issues before the jury. . . .

13 Even if this Court were to determine  
14 that portions of the telephone calls in which  
15 efforts to make the marital privilege  
16 available were relevant, the probative value  
17 of such evidence is substantially outweighed  
18 by the unfair prejudice and confusion of  
19 issues it would entail. Fed. R. Evid. 403.  
20 The jury, hearing the evidence, might think  
21 that it was important that Mr. Peel was  
22 attempting to set the groundwork for a  
23 witness being able to choose to exercise a  
24 legitimate testimonial privilege. Defendants,  
25 however, have every right to explore and  
26 attempt to utilize procedural and testimonial  
27 privileges. It would unfairly prejudice the  
28 jury, and confuse the issues, for the jury to  
be exposed to evidence that Mr. Peel was  
trying to establish the circumstances that  
would allow Ms. Gorski to invoke a legitimate  
privilege.

18 (Id. at 1:28-2:21.)

19 The government counters that the recorded calls are  
20 relevant and admissible to show consciousness of guilt. (Gov't  
21 Opp'n to MIL ("Opp'n") 2:16-18, ECF No. 113.) The government  
22 argues:

23 It is . . . well established law that  
24 efforts made by a defendant to influence or  
25 impede the testimony of a witness are  
26 relevant to consciousness of guilt, and are  
27 therefore admissible under that theory. . . .

28 However, it is not just threats (Ortiz-Sandoval [ v. Gomez, 81 F.3d 891, 897 (9th Cir. 1996)]) and intimidation ([United States v. ]Begay [, 673 F.3d 1038, 1046 (9th Cir. 2011)]) that are admissible to prove

1           consciousness of guilt: any effort to  
2           influence a witness's testimony is  
          admissible. . . .

3           . . . .

4           As set out in prior pleadings, the defendant  
5           was attempting to obstruct justice, by  
6           manufacturing a testimonial privilege where  
7           no such privilege existed before he was  
8           arrested. Throughout his letters and calls,  
9           he makes clear that this is not about  
10          preserving the tranquility of a peaceful  
11          marriage (the underlying purpose of the  
          spousal privilege), but to prevent the jury  
          from learning the truth from Gorski. The  
          defendant tells her "I need you to do this,"  
          "without you they ain't got nothin'," "that  
          is how important this matter is to my case,"  
          "my life depends on it Nicole, or at least my  
          freedom does."

12          . . . .

13                   The jail calls are relevant, probative  
14                   of the defendant's guilt, and properly  
          admissible.

15          (Id. at 2:20-3:4, 5:8-20.)

16                   In a supplemental filing, filed at 2:48 p.m. on  
17                   November 7, 2014, Defendant provided the Court with supplemental  
18                   authority, United States v. Doss, 630 F.3d 1181 (9th Cir. 2011),  
19                   in support of his argument that the referenced evidence should be  
20                   excluded under Rule 403. (Def.'s Supplemental Authority, ECF No.  
21                   114.) Defendant argues:

22                           In United States v. Doss, 630 F.3d 1181 (9th  
23                           Cir. 2011), the Ninth Circuit held that a  
24                           defendant does not engage in "witness  
25                           tampering" under . . . 18 U.S.C. Section 1512  
          when he persuades his wife to exercise her  
          marital privilege not to testify. Id. at  
          1189. . . .

26                   . . . .

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1            Doss . . . support[s] Mr. Peel's motion  
2            in limine because [it] show[s] that  
3            discussions in which he explored with Ms.  
4            Gorski whether she could assert the marital  
5            privilege, urged her to take actions which  
6            would enable her to assert the marital  
7            privilege, or simply urged her to invoke the  
8            marital privilege, are not inherently  
9            wrongful. A defendant does not commit  
10           wrongful by asking a spouse, or someone he  
11           believes might be deemed a spouse by the law,  
12           to assert the marital privilege.

13           (Id. at 1:25-2:15.)

14           The government responded to Defendant's supplemental  
15           authority in a filing at 3:17 p.m. on November 7, 2014, rejoining  
16           that "Doss does not apply to this case." (Gov't Resp. to Def.'s  
17           Supplemental Authority 1:20, ECF No. 115.) The government  
18           contends:

19           First, Doss is about a criminal  
20           prosecution for witness tampering under 18  
21           U.S.C. § 1512 and the sufficiency of the  
22           evidence in that case. That is not the issue  
23           here. Here, the calls are relevant as a part  
24           of the evidence of guilt related to a  
25           different crime, a violation of 18 U.S.C. §  
26           2423(a).

27           Second, in Doss, a husband went to his  
28           real wife and asked her to invoke a valid and  
29           existing privilege. That is not the case  
30           here, where the defendant has taken steps to  
31           corruptly create a privilege that does not  
32           exist.

33           Third, in Doss, to secure a conviction  
34           under § 1512, the government was required to  
35           establish beyond a reasonable doubt that the  
36           defendant acted "corruptly." The issue in  
37           Doss was whether the government had presented  
38           sufficient evidence to do so. That is not the  
39           issue here. Here, the government simply seeks  
40           to use evidence of the defendant's efforts to  
41           silence a witness to establish his  
42           consciousness of guilt regarding a violation  
43           of § 2423(a).

1 Fourth, in Doss, the Ninth Circuit added  
2 a footnote indicating that had the government  
3 presented some evidence of threats or  
4 intimidation, it would have met its burden.  
5 Doss, 630 F.3d at 1190, n.6 ("The government  
6 did not argue that Doss had threatened or  
7 intimidated Ford, which would of course  
8 otherwise violate § 1512.") Here, while the  
9 government has no burden to meet because it  
10 is not required to establish - beyond a  
11 reasonable doubt - that the defendant acted  
12 "corruptly," the government can present  
13 evidence of "intimidation[.]"

14 . . . .

15 Finally, Doss makes no claim to overrule  
16 decades of Ninth Circuit precedent. Doss was  
17 a case about the sufficiency of the evidence  
18 under § 1512, not whether evidence of  
19 consciousness of guilt was admissible in a §  
20 2423(a) prosecution. Doss simply does not  
21 apply to the issue presented here.

22 (Id. at 1:22-3:3.)

23 The government provided in its opposition the following  
24 relevant portions of the Defendant and Ms. Gorski's referenced  
25 communications.

26 On August 25, 2014, jail phone call to  
27 Nicole Gorski:

28 Peel: . . . You might have the  
right to marital privilege. I want  
you to get a lawyer. Go down and  
talk to a lawyer.

Gorski: Okay, listen.

Peel: Go ahead.

Gorski: I talked to the PI. She  
said, 'Uh, are you married.' And  
I'm like, 'No but we've been  
together for 10 years.' She was  
like 'Oh, if you were MARRIED'  
[voice getting louder with  
MARRIED], that it wouldn't - I  
wouldn't be able to do anything,  
like uh, you know what I mean?

Peel: Yeah . . . They're not

1 going to make you get up there and  
2 make you testify.

3 Gorski: Right . . . Is there  
4 common law here or anything . . .

5 Peel: That's what I'm trying to  
6 find out

7 On September 23, 2014, jail call to Nicole  
8 Gorski:

9 Peel: . . . get a form from the  
10 Secretary of State or  
11 Courthouse . . . I need you to do  
12 that as quickly as possible, Nicole  
13 . . . We need to establish that.

14 . . .

15 Peel: . . . But they think they got  
16 you as a witness . . .  
17 [unintelligible] they[re] going  
18 forward with it. Without you, they  
19 ain't got nothin."

20 On October 3, 2014, jail call to Nicole  
21 Gorski:

22 Peel: Hey, did you get ahold of  
23 [unintelligible] lawyers yet . . .  
24 Listen, please go down and do that.  
25 Please go down and do that . . .  
26 Borrow money from your daughter  
27 Barb . . . I'll pay her back . . .  
28 Please go down and do that. See  
where you stand and everything.  
Okay. I want you to protect  
yourself. Alright. Please . . . I  
can't say anything about your  
choices or anything . . . I don't  
want to get in trouble for no  
witness tampering or anything like  
that . . .

29 On October 3, 2014, in a letter to Nicole  
30 Gorski:

31 Ask the lawyer about Domestic  
32 Partnership also. Nicole I cannot  
33 express upon you the importance of  
34 this matter. This is no time to  
35 dilly dally LOL always wanted to  
36 use that, anyway, please take care  
37 of business legally. At least with

1 a lawyer you will have legal advice  
2 you can count on

3 . . .

4 Get the letter notarized and send  
5 me a copy and keep one for yourself  
6 you may want to have the attorney  
7 help you or advise you how to write  
8 it. Nicole please do this yesterday  
9 that is how important this matter  
10 is to my case. In fact, if you can  
11 afford to send it federal express  
12 return receipt that way the Federal  
13 Defenders Agency will have to sign  
14 for it.

15 On October 4, 2014, in a letter to Nicole  
16 Gorski

17 Enclosed you will find a  
18 Declaration for domestic  
19 partnership all you need to do is  
20 follow the format of my declaration  
21 just due yours in your own words et  
22 cetera than call and find out where  
23 the office of the Secretary of  
24 State is and take the two  
25 declarations down with any fees if  
26 there isn't an office in Vegas get  
27 the number and call maybe you can  
28 fax this info. Please, please, do  
this with the quickness, ok? Send  
me a copy!! Once you get it from  
the Secretary's office . . . When  
you call them ask how long the  
procedure takes . . . [Attaching  
Application for Domestic  
Partnership]

29 On October 5, 2014, in a letter to Nicole  
30 Gorski:

31 Nicole take the document that's  
32 with this letter make yours out and  
33 get us registered please my life  
34 depends on it Nicole or at least my  
35 freedom does.

36 On October 17, 2014, in a letter to Nicole  
37 Gorski

38 Call my attorney . . . and tell him  
what you want to do about your  
contention of not testifying for

1 the Government and he will assist  
2 you . . . **And if you think even for**  
3 **a moment that i won't find you when**  
4 **I get out that ain't happening so**  
5 **don't make any plans that I'm not**  
6 **enclued [sic] . . .** This is very  
7 important business Nicole so please  
8 do not fail to handle it. The  
Federal courts do not play. Those  
other papers I sent will accomplish  
the matter. Not to worry I will  
still make it the real thing when  
were [sic] back together again i  
promise ok

9 (Opp'n 3:16-5:4 (emphasis in the government's opposition, other  
10 emphasis from the government's opposition omitted).)

11 Defendant has not shown that the referenced evidence is  
12 irrelevant to the government's "consciousness of guilt"  
13 proposition, on which it argues the evidence has probative value.  
14 See, e.g., United States v. Ortiz-Sandoval, 81 F.3d 891, 897 (9th  
15 Cir. 1996) ("Federal caselaw . . . is uniform in holding that  
16 threats are relevant to consciousness of guilt."); United States  
17 v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976) ("[E]vidence of  
18 conduct designed to impede a witness from testifying truthfully  
19 may indicate consciousness of guilt and should be placed before  
20 the trier of fact."); United States v. Wilson, 447 F.2d 1, 9-10  
21 (9th Cir. 1971) ("[A]n attempt to suborn a witness manifests a  
22 consciousness of guilt."); Madden v. United States, 20 F.2d 289,  
23 294 (9th Cir. 1927) (affirming admission of evidence that the  
24 defendant "engaged [a witness] in conversation . . . and . . .  
25 urged upon him that he ought to have the advice of a lawyer"  
26 whose "advice was that [the witness] could decline to testify  
27 upon the ground that he could not be required to incriminate  
28 himself" as "tending to show a consciousness of guilt").

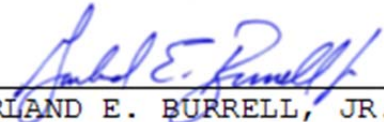


1 Further, Defendant has not shown that the referenced  
2 evidence's "probative value is substantially outweighed by a  
3 danger of . . . unfair prejudice, [or] confusing the issues."  
4 Fed. R. Evid. 403; see, e.g., United States v. Monahan, 633 F.2d  
5 984, 985 (9th Cir. 1980) (rejecting a defendant's Rule 403  
6 argument concerning evidence admitted to show consciousness of  
7 guilt).

8 Moreover, United States v. Doss, 630 F.3d 1181 (9th  
9 Cir. 2011) is distinguishable from this case both legally and  
10 factually. Doss involved "**whether one can be convicted for**  
11 **witness tampering under 18 U.S.C. 1512** by encouraging a witness  
12 to withhold testimony when that witness possesses a legal right  
13 or privilege not to testify[,]" Doss, 630 F.3d at 1183 (emphasis  
14 added); whereas the proffered purpose of admitting the referenced  
15 evidence in this case is to show consciousness of guilt in a  
16 prosecution under 18 U.S.C. § 2423(a). Further, in Doss, the  
17 "evidence at trial established only that [the defendant] appealed  
18 to his **wife** to exercise her marital privilege[;]" whereas here,  
19 the referenced communications evince Defendant was asking his  
20 current or former girlfriend to marry him to create a privilege  
21 that did not already exist. Id. at 1990 (emphasis added). Also,  
22 unlike in Doss, Defendant's communications to Ms. Gorski in this  
23 case include threatening language. (See October 17, 2014 letter  
24 to Ms. Gorski, ECF No. 93-1, page 4 of 7 ("And if you think even  
25 for a moment that [I] won't find you when I get out[,], that ain't  
26 happening so don't make any plans that I'm not included  
27 [sic].").)

1                   For the stated reasons, Defendant's in limine motion is  
2 DENIED.

3 Dated: November 7, 2014  
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8 GARIAND E. BURRELL, JR.  
9 Senior United States District Judge  
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