No. 11-10669

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARRY LAMAR BONDS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES AS APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 07-732 SI

MELINDA HAAG
United States Attorney

BARBARA J. VALLIERE
Assistant United States Attorney
Chief, Appellate Division

MERRY JEAN CHAN
Assistant United States Attorney
450 Golden Gate Avenue, 11th floor
San Francisco, CA 94102
Telephone: (415) 436-7200

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

Dated: July 19, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES, RULES , AND GUIDELINES

LAW REVIEW ARTICLES

No. 11-10669

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARRY LAMAR BONDS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES AS APPELLEE

Defendant-Appellant Barry Lamar Bonds ("Bonds") appeals his jury conviction for obstruction of justice. This Court should affirm. The trial evidence showed that when called to testify before the grand jury as an immunized witness, Bonds tried to impede the grand jury's investigation by falsely denying that he knew anything about his trainer Greg Anderson's distribution of performance-enhancing drugs. This conduct is plainly encompassed by the catch-all provision of the obstruction of justice statute, 18 U.S.C. § 1503. The indictment gave Bonds sufficient notice of the offense with which he was charged, and was not constructively amended by the jury instructions. The district court's jury instructions were also otherwise proper.

JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The judgment of conviction was entered on December 22, 2011. Court Record ("CR") 423. Bonds filed a timely notice of appeal. CR:424; Fed. R. App. P. 4(b)(2). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Bonds is not in custody. *See* CR:421, 428. His sentence of probation was stayed pending appeal. *See id.*; Supplemental Excerpts of Record ("SER") 100.

ISSUES PRESENTED

I. Whether a rational juror could reasonably infer from the trial evidence, viewed in the light most favorable to the prosecution, that Bonds violated 18 U.S.C. § 1503.

II. Whether Section 1503's omnibus clause is unconstitutionally vague as applied to Bonds because

   A. it does not prohibit corrupt endeavors to influence or impede grand jury proceedings made through direct testimony to a grand jury; and

   B. to the extent it does cover statements made to a grand jury with the corrupt intent to influence or impede its investigation, those statements must be literally false rather than deceitfully misleading or evasive.

III. Whether the indictment gave Bonds adequate notice of the Section 1503 charge, or was constructively amended by the jury instructions.

IV. Whether rejecting Bonds's "totality" language for the jury instructions constituted an abuse of the district court's discretion.

STATEMENT OF THE CASE

The Indictment upon which Bonds was tried issued on February 10, 2011, and charged him with four counts of making false statements (18 U.S.C. § 1623), and in Count Five, one count of obstruction of justice (18 U.S.C. § 1503). Excerpts of Record ("ER"):193-98; *see* CR:1 (original indictment); CR:37, 47 (superseding indictment); CR:52, 77 (second superseding indictment).

Bonds's jury trial began on March 22, 2011. CR:311. Prior to jury deliberations, the government dismissed Count Four. CR:356-60. On April 13, 2011, the jury found Bonds guilty of Count Five. ER:40. The jury was "divided" on the three false statements charges, and later, at the government's request, the district court dismissed these without prejudice. ER:39; CR:375, 415, 417, 421.

On August 25, 2011, the district court denied Bonds's motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29, or a new trial pursuant to Fed. R. Crim. P. 33. CR:412; *see* CR:396, 407-08.

On December 16, 2011, the district court sentenced Bonds to two years of probation with 30 days of home detention, 250 hours of community service, and a $4,000 fine. CR:421.

STATEMENT OF THE FACTS

A. Overview

The jury found beyond a reasonable doubt that Bonds obstructed justice "by knowingly giving material testimony that was intentionally evasive, false, or misleading," where "material" was defined as having "a natural tendency to influence, or [being] capable of influencing, the decision of the grand jury." ER:157. In addition, the jury unanimously agreed that "Statement C," *see infra* p. 13, was an obstructive statement. ER:40, 158-59.

The jury's verdict was based on evidence that Bonds was called as a witness to give the grand jury evidence about the illegal distribution of performance-enhancing drugs ("PEDs") and related financial crimes by the Bay Area Laboratory Cooperative ("BALCO"), its president Victor Conte ("Conte"), and Bonds's trainer Greg Anderson ("Anderson"). Although never a target of the investigation and given immunity for his testimony, Bonds refused to truthfully answer the key questions presented to him. Bonds told the grand jury that he did not believe that Anderson and BALCO had ever provided him with any illegal substances or services. Bonds also told the grand jury that he had no knowledge

of Anderson and BALCO's involvement with PEDs because he made it a practice to stay out of his friends' business. Bonds's testimony was false, misleading, and evasive. Bonds was, in fact, Anderson's client from 1998 to 2003, and paid him for PEDs.

B. The BALCO investigation

In the summer of 2002, the Criminal Investigation Division of the Internal Revenue Service began an investigation into financial crimes stemming from the illegal distribution of PEDs when Special Agent Jeff Novitzky ("SA Novitzky"), then a nine-year veteran of the agency, received information that BALCO, registered as a blood testing laboratory, was distributing PEDs to elite professional athletes. SER:126, 130-34.

PEDs include anabolic steroids ("steroids") and human growth hormone ("HGH"), both of which are federally regulated. SER:299-301, 326. These substances can improve athletic performance by promoting muscle growth while curbing the side effects of excessive training, but can have dangerous side effects, and are therefore illegal unless prescribed by a licensed doctor. SER:133, 299-304, 326-45.

SA Novitzky identified three primary targets: Conte, BALCO's vice president James Valente, and Anderson, a personal fitness trainer at a gym half a block from BALCO whose clients included professional athletes. SER:142-44,

162. None of these men were qualified or licensed to prescribe drugs. SER:143-44.

On September 3, 2003, pursuant to warrants, SA Novitzky conducted searches of BALCO and Conte's residence and mailboxes, and found evidence of illegal distribution of PEDs to athletes. SER:156-59. Conte and Valente both stated that Anderson was involved with BALCO and distributed PEDs. SER:160.

Based in part on these statements, SA Novitzky obtained a warrant to search Anderson's residence and car. SER:161. The search revealed injectable steroids, HGH, a clear liquid in a needle-less syringe, a cream in a screw top plastic vial with a measuring spoon, syringes, shipping receipts, documents showing Anderson's connection to professional athletes, and $60,000 in cash. SER:25-28, 166-88.

The clear liquid was tetrahydragestrinone ("THG"), a designer steroid administered in drops under the tongue, unknown to anti-doping authorities until August of 2003, when the United States Anti-Doping Agency, a non-governmental entity, received information that BALCO and Conte were distributing it to professional athletes around the world. SER:154-55, 170-71, 308-10. Conte referred to it as "The Clear" in correspondence with athletes and coaches. SER:140-41. The cream, which Conte referred to as "The Cream," was a mixture of testosterone and epitestosterone absorbed through the skin to mask the

testosterone-epitestosterone ratio imbalance caused by steroid use. SER:140-42, 170, 315-16, 322.

C. Bonds is subpoenaed to testify as a witness before the grand jury in the BALCO investigation

To determine the extent of the drug dealing, the drugs being distributed, and "whether or not certain transactions could be money-laundering transactions," SA Novitzky worked with federal prosecutors to call approximately thirty athletes, including Bonds, a baseball player for the San Francisco Giants, to testify before the grand jury. SER:189-91. None of the athlete witnesses called to the grand jury was a target of the BALCO investigation or prosecuted for distributing, possessing, or using steroids. SER:192-93.

D. The government immunizes Bonds for truthful testimony to the grand jury

Investigators had reason to believe that Bonds had information to further the BALCO investigation. SA Novitzky found Internet postings by Conte boasting about his expertise in steroids and work with professional athletes, including Bonds. SER:130-31. SA Novitzky also found magazine articles linking Bonds to Conte and Anderson. SER:71-72, 145-53. To obtain Bonds's evidence about Conte's and Anderson's distribution of PEDS, the government sought and a federal district judge granted immunity to Bonds. The December 1, 2003, immunity order provided that so long as Bonds gave truthful testimony, this

testimony could "not be used against him in any criminal case." SER:73-74, 194-96.

E. Bonds testifies before the grand jury

Bonds, "having been first duly sworn," testified before the grand jury on December 4, 2003. ER:263.

1. Bonds is informed of the subject matter of the grand jury's inquiry and his immunity order

At the beginning of his grand jury testimony, a prosecutor stated that Bonds was "here today as a witness" in "an ongoing investigation by the grand jury into alleged illegal activities undertaken by Victor Conte and Greg Anderson." ER:264. The "types of charges" the grand jury was "looking at in connection with" Conte and Anderson included "conspiracy to possess or distribute illegal substances" and "money laundering." ER:264-65. A prosecutor reviewed Bonds's immunity order with him, and Bonds affirmed that he had discussed it with the prosecutors in the presence of his attorney prior to entering the grand jury room. ER:266-71; SER:193-94.

2. Bonds testifies that Anderson and Conte never supplied him with PEDs

Bonds told the grand jury that the scope of Anderson's work with him was pushing him to "really maximize and expand [his] muscle[s]" through exercise repetitions and "[v]itamins and protein shakes." ER:275, 284. Beginning in 2000

or 2001, to personalize Bonds's dietary supplementation, Anderson tested Bonds's blood and urine for mineral deficiencies, and in 2003, Anderson provided him "flax seed oil" and a "lotion" for arthritis. ER:276-95.

Bonds testified that Anderson never offered him, supplied him with, or administered to him any steroids[1] (ER:291, 299, 305, 306-07, 308, 311, 339-40), HGH (ER:300-01, 305-07, 338, 339-40), Clomifed or Clomid – an anti-estrogen prescription drug (ER:309-10, 340), syringes (ER:313), or any injectable substance whatsoever (ER:301-03, 305-08).

As for Conte, Bonds testified to knowing him only through Anderson, as the provider of vitamins, protein shakes, blood and urine testing, as well as "flax seed oil" and "lotion." ER:279-82, 292, 299, 302, 320, 327-29, 333, 371-72.

3. Bonds testifies that because he trusted Anderson and was unfamiliar with BALCO, he did not have evidence of Anderson's and BALCO's distribution of PEDs

Bonds told the grand jury that if Anderson or Conte distributed PEDs, he did not know anything about it. Bonds claimed that he did not pay attention to or question what Anderson gave to him, but trusted that they were not PEDs because Anderson knew that Bonds was "against that stuff" and would "never jeopardize our friendship" – which he claimed dated back to their childhood. ER:273-74,

---

1/ Charged in Count One as a false statement, this denial was given to the jury as a possible example of obstructive testimony in Count Five. SER:7, 10.

287, 290-91, 293-99, 305-08, 311-13, 315, 335-36, 339-40. Bonds would take anything Anderson gave him without asking any questions. ER:291; *see*, *e.g.*, ER:277, 279-80, 284, 339-40. If this type of friendship seemed "a little bit different," Bonds explained it was because Anderson was a really "good guy."[2] ER:308-09.

The first time that the prosecutor asked Bonds if Anderson ever provided him with anything other than weight-lifting advice and vitamins and protein shakes, Bonds gave a lengthy response enumerating reasons why he did not pay attention to what Anderson gave him during the 2003 baseball season: his father's death from cancer which left him "fatigued, tired," and in need of recovery; and the fact that "everyone tries to give me everything. You got companies that provide us with more junk to try than anything." ER:282-83. Bonds then said that Anderson had provided him with "some flax seed oil, that's what he called it, called it some flax seed oil, man" taken under his tongue, and rubbed a spoonful of "some lotion-type stuff" on the inside of his elbow. ER:283, 285-89, 294-96, 366. Bonds claimed he "never kept track" of how often he took the flax seed oil and lotion.[3] ER:297-98. Bonds identified an exhibit of The Clear as what the "flax

---

2/ This was given to the jury as Statement D, a possible example of obstructive testimony in Count Five. SER:11-12.

3/ This was given to the jury as Statement B, a possible example of obstructive testimony in Count Five. SER:11.

seed oil" he received from Anderson looked like, and an exhibit of The Cream as what the "lotion" he received from Anderson looked like. ER:284-87, 293-95; SER:173-74. But Bonds testified that he "had no reason to doubt" Anderson's representation that these substances were flax seed oil and a lotion, particularly since Anderson always administered these substances to him in the open, "always at the ballpark," in front of reporters and Bonds's teammates.[4] ER:288-90, 312. In any case, the substances had no effect: "If it's a steroid, it ain't working." ER:285, 290, 298-99, 313.

As for Conte and BALCO more generally, Bonds claimed that he had "never been in BALCO long enough to know anything they did." ER:300. Bonds testified that he had seen Conte three times, at most. ER:281-82, 329. He first met Conte in 2000 or 2001, when Anderson brought him to BALCO to learn about blood analysis for mineral deficiencies. ER:276, 280-82, 292. The last time they met was around May or June 2003, when, on behalf of Conte, Anderson arranged for Bonds to promote Conte's product ZMA, a zinc-magnesium-vitamin B supplement, as a remedy for mineral deficiency, in a muscle magazine. ER:292, 329, 336; SER:137.

4/ This was given to the jury as Statement A, a possible example of obstructive testimony in Count Five. SER:10-11.

4. Statement C and Bonds's testimony that his unique "friendship" with Anderson also accounted for his lack of evidence about Anderson's and BALCO's distribution of PEDs

Bonds testified that besides trusting Anderson, his practice of staying out of his friends' "business" explained why he did not have any evidence about Anderson and the distribution of PEDs. ER:280, 290-92, 301, 322-23, 330-31, 348-50.

During questioning about Anderson and injectable steroids and HGH, Bonds was asked if Anderson had ever given him anything that required a syringe to inject. ER:300-01. Bonds did not answer the question, but stated, "I've only had one doctor touch me. And that's my only personal doctor." ER:301. He then launched into a lengthy discourse about his friendship with Anderson, which accounted for why he did not have evidence about Anderson's PED-distribution to give to the grand jury. ER:300-02; SER:11. Bonds explained that "[w]e're friends, but" he and Anderson did not talk about baseball or "his business." ER:301. Bonds had learned from growing up "with a famous father" and being himself a celebrity "in baseball" not to "get into" the "personal lives" or "business" of his friends. ER:301-02, 350. This distance was "what keeps our friendship." ER:301.

Bonds's "friendship" explanation for why he had no information to give the grand jury about Anderson's distribution of PEDs was excerpted as Statement C in

the jury's instructions on Count Five as a possible example of obstructive testimony:

> Q: Did Greg ever give you anything that required a syringe to inject yourself with?
>
> A: I've only had one doctor touch me. And that's my only personal doctor. Greg, like I said, we don't get into each others' personal lives. We're friends, but I don't – we don't sit around and talk baseball, because he knows I don't want – don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends. You come around talking about baseball, you go on. I don't talk about his business. You know what I mean?
>
> Q: Right.
>
> A: That's what keeps our friendship. You know. I am sorry, but that – you know, that – I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see. . . .

ER:301; SER:11.

After Bonds finished his explanation, the prosecutor asked whether Anderson or Conte ever gave him "a liquid that they told you to inject into yourself to help you with this recovery type stuff." ER:302. Bonds replied, "No." ER:302. A second prosecutor interrupted to clarify whether anyone other than Bonds's "own personal doctor" had "ever injected anything in to you or taken anything out." ER:302-03. Bonds spoke of the Giants's team doctor and medical

personnel involved in his surgeries, before the prosecutor pressed on whether "Anderson or any associates of his" had injected him. ER:303. Bonds replied, "No, no."[5] ER:303. Bonds also denied ever injecting himself with anything Anderson gave to him. ER:303. The prosecutor later asked Bonds again whether Anderson had ever given him HGH, and Bonds replied, "No."[6] ER:305-06.

5. Bonds testifies that due to his "friendship" with Anderson, he never paid for any substances

Bonds testified that because of their friendship, Anderson never gave him an invoice for substances or services or required a contract. ER:274-75, 297, 315, 336. In fact, Anderson "didn't want any money" and "never asked" for any money from Bonds. ER47-48, 322. Nor did BALCO ever charge Bonds for anything. ER:372. In turn, Bonds "never paid" Anderson, Conte, or BALCO "for anything." ER:305, 315, 337, 367, 372.

Bonds testified that he did give Anderson $15,000 a year, roughly the same amount of money that he paid his two other trainers. ER:362-63, 370. However, Bonds insisted that this and the $20,000 he gave to Anderson after hitting 73 home

---

5/ Charged in Count Two as a false statement, this denial was given to the jury as a possible example of obstructive testimony in Count Five. SER:8, 10.

6/ Charged in Count Three as a false statement, this denial was given to the jury as a possible example of obstructive testimony in Count Five. SER:9, 10.

runs were "gifts" that Bonds gave "in exchange for the workouts" and motivated by Bonds's desire to help his "childhood friend." ER:322-23, 358-64.

Bonds testified that his endorsement of ZMA in an interview with Muscle & Fitness magazine was just a "[t]hank you" "favor" for BALCO's "favor" and "kindness" of free vitamins and protein shakes. ER:322-23, 327-29, 371-72.

F. Evidence that Bonds withheld what he knew about BALCO's and Anderson's distribution of PEDs from the grand jury

Contrary to Bonds's grand jury testimony, and as revealed by the evidence at trial, Bonds knew that Anderson had sold him PEDs, including injectable steroids, injectable HGH, The Clear, and The Cream, over the course of approximately five years.

Bonds started working with Anderson around 1998. SER:237-38, 1095; ER:271-73. In a recorded conversation with Bond's childhood friend, confidante, and personal assistant since 1993, Steve Hoskins ("Hoskins"), Anderson explained that he gave Bonds steroid injections, and reduced the risk of puddling and abscesses by being careful to "move" the injection location "all over the place." SER:37-38, 81, 219-36, 270-72, 282, 317-19. Indeed, not long after beginning to work with Anderson, Bonds obtained research from his orthopedic surgeon on injectable steroids and their side effects. SER:30-35, 242-45, 250-56, 535-38. Bonds attributed his 1999 elbow injury to steroids causing his muscles to grow

faster than the joint could handle. SER:251, 369-70, 538. Bonds explained to his girlfriend Kimberly Bell ("Bell") that other baseball players were also using steroids to get ahead and that he did not "shoot it up everyday like bodybuilders did." SER:358, 369-70.

Bonds continued to receive injections from Anderson between 2000 and 2003. Hoskins, his sister Kathy Hoskins, and Bell each saw Anderson and Bonds lock themselves together behind closed doors. SER:261-64, 379, 389-90, 552-53, 556. On those occasions, Anderson carried a kit resembling what was later found in his residence to contain alcohol wipes, numerous syringes, and vials of liquid. SER:167-69, 379, 390-91. Hoskins once saw Anderson emerge with a syringe and needle. SER:262. During the 2000 spring training, Bonds complained to Hoskins that steroid injections were making his muscles sore. SER:260-61.

By the beginning of the 2003 baseball season, in a recorded conversation with Hoskins, Anderson described his regimen for Bonds as "undetectable." SER:37-38, 270-72, 282. It included HGH, typically injected into a fold of abdominal skin with a small needle, which confers similar benefits to steroids but gives users a leaner look and is virtually undetectable. SER:81, 245-48, 324-28, 344. Anderson sold HGH to his clients, sometimes with a calendar for when and how much to take. SER:469, 488-89, 513-15, 528-29. During the 2002 baseball season, while Kathy Hoskins ("Kathy") was helping Bonds pack for a trip, she

witnessed Anderson give Bonds an injection in the abdominal area. SER:554-56. On that occasion, Bonds assured Anderson that Kathy was "my girl" and "she don't say nothing to nobody," explaining to Kathy that the injection was "a little some some" for "when I go on the road," and that "we can't detect it, you can't catch it." SER:554.

In addition, Anderson was administering, and Bonds's urine sample tested positive, for the designer steroid The Clear ("THG"), and the masking agent The Cream. ER:43, 70, 283, 285-89, 294-96, 366; SER:37-38, 81, 252, 471-72, 490-91, 507-08, 574-75. Anderson sold his clients these substances, which he promoted as "undetectable steroids," and gave them instructions for taking The Clear under the tongue, and rubbing The Cream on the arm. SER:471-74, 490-92, 507-10, 515, 521. There was no evidence that Bonds used these substances in the open at the ballpark. SER:403, 416-17, 496, 510-11, 540. Anderson also gave Bonds, and Bonds's urine sample tested positive for, clomiphene, a female fertility drug used to restart natural testosterone production in male steroids users and prevent them from developing breasts. SER:48-68, 81, 321-22, 337-38, 573a-74. Anderson regularly tested Bonds's blood and urine at BALCO to make sure Bonds's PEDs-use was not detectable. ER: 276-77; SER:316.

Although Bonds portrayed his relationship with Anderson to the grand jury as a close friendship stemming back to childhood, there was no evidence that

Bonds and Anderson had any personal or social relationship outside of Anderson's provision of PEDs and weight-training services to Bonds. SER:237-38, 379-80, 399, 460, 500-01, 525, 537, 551, 553, 557. Bonds, who had formal working agreements with Hoskins, *see*, *e.g.*, SER:88-90, paid Anderson for the "different deals" they had "worked out" in "vary[ing]" amounts of money either directly or through Hoskins. SER:233, 237-41, 537; ER:274-75, 297, 316-18, 330, 363, 369-70. When Bonds hit 73 home runs, he "met [his] bonus," and in turn, paid Anderson his bonus. ER:358. Moreover, Bonds's admission to Stan Conte,[7] the Giants's athletic trainer, that he was the source of the $60,000 in currency found in Anderson's home on September 3, 2003, suggested that Bonds paid Anderson much more than $15,000 a year. SER:410-12.

Aside from direct monetary payments, Anderson got a quid pro quo in the form of additional business from his work with Bonds. Bonds earned $17 million a year directly or indirectly from what he called the "business" of baseball and acknowledged that "[i]f I took eight Advils before a game, you know, a player is going to take eight Advils and think that it's the thing to do." ER:316, 318, 323. A number of professional baseball players who knew Anderson as Bonds's trainer contacted Anderson to sign up and pay for the same program that helped Bonds.

7/ No relation to Victor Conte.

ER:316-17, 358-59; SER:457-58, 461, 523-30. Bonds also publicly endorsed BALCO and Anderson. ER:327-30, 371-72.

G. Evidence that Bonds's obstruction of the BALCO investigation was intentional

The evidence at trial showed that Bonds's refusal to tell the grand jury what he knew about BALCO's and Anderson's distribution of PEDs was intentional.

Prior to his December 4, 2003, grand jury testimony, Bonds publicly announced that he had tested negative for steroids. SER:334-35.

He also cut off his relationships with people who knew that he was using PEDs, thus undermining their credibility on the matter. In March of 2003, Bonds terminated his life-long family relationship with "best friend" Hoskins, after accusing him of stealing. SER:207, 212, 290-91, 381, 363, 459. Hoskins had become vocal in trying to "stop [Bonds] from taking steroids" after witnessing Bonds tell Anderson that he would inject himself if Anderson would not. SER:264-65, 269-71. Bonds also ended his relationship with Kathy Hoskins, who had seen Anderson inject him in the abdomen. SER:556a-b.

Similarly, Bonds abruptly broke up with Bell, his girlfriend of ten years, and to whom he had confided his use of steroids, telling her to "disappear." SER:358, 378. He later tried to pay her $20,000 to sign a confidentiality agreement. SER:391a.

In October of 2003, Bonds approached Stan Conte ("Stan"), who had also been subpoenaed to testify before the grand jury, about the recent search of BALCO and Anderson's residence. SER:409-10. Bonds told Stan that "it was unfair what the government was doing to" Anderson, that he "trusted" Anderson, that "he didn't know anything about the steroids," and that Anderson "was only selling the steroids to help his kid." SER:410.

Stan responded that "since he and I were both grand jury witnesses we probably shouldn't be having the conversation." *Id.* Bonds nevertheless "continued," claiming that Anderson had put Bonds's initials on some calendars to protect other players, and that he had given Anderson the $60,000 found at Anderson's home to hold for use with Bonds's female companions. SER:410-12. When Stan opined that PEDs made for an unlevel playing field, Bonds suggested how Stan's son, an athlete, could get a performance-enhancing cream. SER:411-12.

In addition, prior to his grand jury testimony, Bonds accompanied his lawyer to the office of Anderson's lawyer four or five times, where the two lawyers had discussions. ER:351-55.

H. Materiality

SA Novitzky testified that inconsistencies between Bonds's testimony and the other evidence he had gathered had the potential to affect the BALCO

investigation. SER:209-11. Bonds's testimony that he neither received PEDs from Anderson and BALCO, nor paid them for anything, undermined evidence that Anderson and BALCO engaged in a scheme to launder proceeds for illegal drugs by taking payment in the form of Bonds's valuable "advertising for some of their legitimate, legal products." *Id.* If Bonds was "indeed unknowingly being distributed these drugs," then "those individuals distributing these drugs to him, which were potent, dangerous drugs, could potentially be charged with assault" or other crimes. *Id.* Bonds's testimony required SA Novitzky to "reevaluate" other testimony and determine "which person's telling us the truth here." *Id.*

SUMMARY OF ARGUMENT

I. The evidence at trial supports the jury's verdict that Bonds obstructed justice by giving material testimony to the grand jury that was intentionally false, misleading, or evasive.

Statement C cut off the flow of information to the grand jury in all three ways – by being false, *and* misleading, *and* evasive. Bonds's statement that his friendship with Anderson was maintained by his practice of keeping out of Anderson's business was literally false. The evidence, viewed in the light most favorable to the government, showed that Bonds's relationship with Anderson was based on the intersection of their respective businesses: Anderson sold Bonds PEDs, which assisted Bonds in his profession of baseball.

Bonds's statement was also misleading because it falsely suggested to the grand jury that he did not have any information about Anderson's distribution of PEDs, when in fact, he did.

Similarly, Bonds's statement was deceitfully evasive. Instead of directly answering the grand jury's specific question about whether Anderson ever gave him injectable substances with a truthful yes, Bonds created the false impression that he would have no way of knowing whether Anderson was involved in the distribution of PEDs because "I just don't get into other people's business."

This misimpression was material because it deprived the grand jury of evidence about BALCO and Anderson's distribution of PEDs and related financial crimes.

II. The case law from this and five other circuits, as well as Section 1503's legislative history, all indicate that Section 1503 is not void for vagueness as applied to this case. Bonds intentionally deprived the grand jury of what he knew about BALCO's and Anderson's distribution of PEDs. Bonds did this by lying to, misleading, and evading the questions of the grand jury, even though he was in an official proceeding, sworn to tell the truth, and immunized from prosecution for his involvement with PEDs. A person of ordinary intelligence would understand that this behavior was obstruction of justice. Because Section 1503 is constrained by the requirements that the obstructive behavior occur in the context of a grand jury

proceeding, and that a defendant act with the corrupt purpose of obstructing justice, law enforcement have sufficient guidance in enforcing the statute judiciously.

III. The Indictment gave sufficient notice to Bonds of the charges to be brought at trial. It recited all of the essential elements of Section 1503, and specified that Bonds obstructed justice on December 4, 2003, through his intentionally false, misleading, and evasive denials to the grand jury that he had any knowledge or involvement with BALCO, Conte, and Anderson, with respect to the distribution of PEDs.

The jury instructions did not constructively amend the Indictment by restricting the petit jury from finding Bonds guilty of obstruction of justice unless it unanimously found one of seven specific statements from Bonds's grand jury testimony obstructive. The grand jury considered all of Bonds's grand jury testimony and could rely on any portion or the whole of Bonds's testimony in returning the Indictment. The jury instructions merely narrowed the Indictment, which is not a constructive amendment.

IV. The district court did not abuse its discretion in rejecting Bonds's proposed amendments to the jury instructions. Bonds's proposed "totality" language was unnecessary. The jury instructions as a whole were clear that the jury should consider the entire grand jury transcript, as well as all of the other trial evidence. An error was harmless.

ARGUMENT

I. THE TRIAL EVIDENCE WAS SUFFICIENT TO SUPPORT BONDS'S CONVICTION FOR OBSTRUCTION OF JUSTICE

A. Standard of review

This Court reviews de novo a district court's determination that sufficient evidence supports a conviction. *United States v. Chung*, 659 F.3d 815, 823 (9th Cir. 2011).

This Court must uphold a jury's conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt from the trial evidence – both circumstantial and direct, as viewed in the light most favorable to the prosecution. *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc) (clarifying *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Lindsey*, 634 F.3d 541, 552 (9th Cir. 2011) (logical inferences from circumstantial evidence may support conviction).

Bonds asserts that his grand jury testimony should be taken as truthful because the jury did not convict him of making a false statement. AOB:2, 6, 37-38. That is flatly contrary to the law. The jury did not acquit Bonds of any of the charges, and "conjecture about possible reasons for" the jury's "failure to reach a

decision" on Counts One through Three[8] may play "no part in assessing the legal consequences of [the] unanimous verdict that the jurors did return" on Count Five. *Yeager v. United States*, 129 S. Ct. 2360, 2367-68, 2370 (2009); *see United States v. Powell*, 469 U.S. 57, 60, 63-66 (1984) (noting that jury has unreviewable power to return verdict of not guilty for impermissible reasons).

This Court "must presume . . . that the trier of fact resolved any . . . conflicts [over the inferences to be drawn from evidence] in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326; *Coleman v. Johnson*, 566 U.S. –, 132 S. Ct. 2060, 2064 (2012) (per curiam) (Court may not engage in "fine-grained factual parsing" to undermine jury's inferences). Thus, in its sufficiency analysis on Count Five, this Court must view Bonds's grand jury testimony as false where this view is supported by evidence and favors the prosecution. *See* ER:14-15 & n.8.

B. The trial evidence fully supported the jury's verdict that Bonds obstructed justice in his grand jury testimony

i. Elements of Section 1503

As set forth in the jury instructions, the elements of 18 U.S.C. § 1503 are that the defendant (1) for the purpose of obstructing justice, (2) obstructed, influenced,

---

8/ The jury was instructed that a "verdict on one count should not control your verdict on any other count." SER:5.

or impeded, or endeavored to obstruct, influence, or impede the grand jury proceeding in which defendant testified, (3) by knowingly giving material testimony that was intentionally evasive, false, or misleading. SER:10.

ii. The trial evidence shows that Bonds's testimony was intentionally obstructive

Read in the light most favorable to the government, the trial evidence showed that Bonds knowingly paid Anderson for steroid and HGH injections, from 1998 to 2003. *See supra* pp. 15-20. Bonds deprived the grand jury of his evidence by repeatedly falsely denying that he had knowingly received PEDs from Anderson, and repeatedly concealing what he knew by evading questions and misleading the jury into thinking that he did not know anything about Anderson's and BALCO's distribution of PEDs or money laundering. *See supra* pp. 8-15. Given that Bonds had tried to influence Stan Conte's grand jury testimony, undermined the credibility of eye-witnesses to Anderson's sales and distribution of PEDs to him, and was involved in Anderson's legal defense, the jury could infer that Bonds's conduct was intentional. *See supra* pp. 19-20.

iii. The trial evidence shows that Statement C was an example of an obstructive statement

The jury found that Statement C was an example of an obstructive statement. The three terms: false, evasive, and misleading, are synonymous in the sense that all carry an element of deception. However, they are distinct in how they deceive,

and therefore are different means for obstructing a grand jury. *Cf. United States v. Gipson*, 553 F.2d 453, 458 (5th Cir. 1977) (explaining that same conduct was "characterizable" as "receiving, concealing, or storing"). Although the jury had to find only that Statement C was intentionally false, *or* intentionally misleading, *or* intentionally evasive, the trial evidence showed that it was all three. *See United States v. Bettencourt*, 614 F.2d 214, 219 (9th Cir. 1980) ("[A] jury may convict on a finding of any of the elements of a disjunctively defined offense, despite the grand jury's choice of conjunctive language in the indictment.").

(a) Statement C was literally false

Bonds's repeated assertions that Statement C was literally true, Appellant's Opening Brief ("AOB") 1, 13, 33, 38, 43, do not make it so. The trial evidence showed that Statement C – "That's what keeps our friendship." – was false. ER:301. Keeping out of each other's personal lives and business was not the basis for Bonds's relationship with Anderson, and was not the reason why Bonds had no information to give about Anderson's distribution of PEDs. The trial evidence showed that Bonds knew that Anderson had supplied and injected him with PEDs since roughly 1998. Anderson's practice was to tell his clients what PEDs he was giving to them, and Anderson told Hoskins that he had given Bonds steroid injections as well as PEDs that were undetectable. Bonds admitted to Hoskins that steroid injections caused him discomfort. Hoskins saw Anderson emerge from

behind closed doors with Bonds, holding a syringe. Bonds told Bell that although he did not "shoot it up" like bodybuilders, steroids caused him to suffer an elbow injury. Bonds told Kathy Hoskins that the injection Anderson gave him in his abdomen was something for the road that was undetectable. Bonds paid Anderson for their different deals. Anderson was constantly helping Bonds with his baseball career, and Anderson received money from Bonds for his assistance. The jury could thus conclude that Anderson's business was Bonds's business.

Bonds claims that the government conceded at trial that Statement C was not false. AOB:7, 12-13. This is not true. The government specifically asked for jury instructions that allowed the jury to find that Statement C was either false, or misleading, or evasive. SER:10, 117. Further, the government's closing argument contended that Bonds "knew he was testifying in a false, material manner with the purpose of obstructing the grand jury," and that the statements submitted in the jury instructions were "examples." ER:113, 118. The government's failure to make a focused argument on Statement C as literally false did not amount to a concession that it was literally true. *Cf. United States v. Doss*, 630 F.3d 1181, 1195 (9th Cir. 2011) (jury cannot be assumed to have interpreted government's remarks in manner that supports defendant's argument). The jury was instructed that the government's argument was not evidence, and that it should decide whether Bonds was guilty of Count Five "solely on the evidence and the law" as given in the jury instructions.

SER:3. Where the trial evidence, viewed in the light most favorable to the government, showed that Bonds knowingly paid Anderson for PEDs, that Bonds tried to influence Stan Conte's grand jury testimony regarding Anderson, that Bonds knew that evidence tying him to PEDs had been found at Anderson's residence, and that Bonds was involved in Anderson's legal defense, the jury could infer that Bonds's relationship with Anderson was not maintained by keeping out of each other's business, and that Statement C was literally false.

(b) Statement C was misleading

Statement C was intentionally misleading. It informed the grand jury that Bonds had no information to provide about Anderson's distribution of PEDs because the two men's "friendship" was maintained by Bonds keeping out of Anderson's personal life and business. Taking Bonds's representation at face value, the grand jury should have ceased its inquiry. In fact, as the trial evidence, viewed in the light most favorable to the prosecution, showed, Bonds had a lot of information about Anderson's distribution of PEDS to him that he chose to withhold from the grand jury.

Statement C's misdirection of the grand jury's attention from Bonds's business connection with Anderson obstructed justice, regardless of whether the individual statements composing it were also all literally false. Even if Bonds actually considered his relationship with Anderson to be a friendship, and truly did

not generally "get into other people's business" as a result of growing up with a famous father, these stitches of truth were used to construct a lie. Bonds knew that Anderson was distributing PEDs to him. Statement C was deceitful in suggesting that Bonds did not have this information because Bonds kept himself ignorant of his friends' affairs. *Cf. United States v. Laurienti*, 611 F.3d 530, 538 (9th Cir. 2010) (securities law prohibits misleading through half-truths).

(c) Statement C was evasive

For similar reasons, Statement C was evasive. Bonds avoided giving the grand jury his evidence of Anderson's distribution of PEDs by creating the false impression that he did not have any evidence to give because he stayed out of Anderson's business.

Statement C was also specifically evasive of the question that directly preceded it – whether Anderson ever gave Bonds "anything that required a syringe to inject" himself with. ER:301. Bonds characterizes this as a question regarding self-injection. AOB:37-38. The subject of the question was actually whether Anderson gave Bonds "anything" injectable. *Compare* ER:301-02 *with* ER:303 ("have you ever yourself injected yourself"); *see* ER:14 (questions were "whether Anderson had ever provided him with injectables"); *cf. United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004) (perjury conviction upheld where jury could conclude that defendant understood somewhat ambiguous question as government

did, and falsely answered). Either way the question is interpreted, Bonds's answer that only his "personal doctor" "touch[ed]" him was non-responsive, and not true, in light of the evidence that Anderson gave him injections. ER:301-02. Bonds then immediately launched into his diversionary, completely off-topic explanation of how, because he had grown up with a famous father, he and Anderson could only be friends because "we don't get into each others' personal lives," "he knows . . . don't come to my house talking baseball," and "I don't talk about his business." *Id.*

Bonds tries to blame Statement C on the prosecutor. AOB:35. He is not entitled to this self-serving interpretation, post-conviction. *See* ER:18. The prosecutor said, "Right," only as a response to Bonds's own interjection, "You know what I mean?," in the middle of his diversionary discourse on friendship. ER:301. Immediately after Bonds concluded his answer, the prosecutor essentially reiterated his question, asking if Anderson or Conte ever provided Bonds with an injectable liquid. ER:302. Bonds answered no. *Id.*

Bonds argues that because he eventually answered the prosecutor's question, Statement C was not evasive. AOB:37. This Court has been quite clear that Section 1503 is "analogous to inchoate offenses like attempt and conspiracy," and "[o]ne need not succeed in obstructing justice to be convicted of violating" the statute. *United States v. Fleming*, 215 F.3d 930, 936 (9th Cir. 2000); ER:14-15.

But the trial evidence construed in the light most favorable to the government shows that, contrary to his insistence (AOB:2, 37), Bonds never got around to telling the truth.

Bonds tried to avoid giving direct answers about Anderson's distribution of injectable PEDs, but faced with persistent questioning, he repeatedly denied that Anderson had given him injectables or injections. The trial evidence, viewed in the light most favorable to the government, shows that those denials were false, and this Court may not view the evidence differently based on the jury's failure to reach a verdict on the false statement charges. Anderson said in a recorded conversation that he gave Bonds steroid injections. Bonds complained of soreness from steroid injections. Kathy Hoskins saw Anderson give Bonds an HGH injection, which Bonds explained to her was undetectable. Bonds knew that Anderson had provided him with injectable substances, and had injected him.

Bonds was not engaging in an informal conversation, but giving immunized testimony under oath at a proceeding which "has the formality and gravity necessary to remind the witness that his . . . statements will be the basis for official governmental action." *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012). Given that, and the fact that Bonds lied to the grand jury on the topic of injections, the petit jury fairly rejected Bonds's explanation of Statement C as a "rambling" detour to the truth, SER:109; AOB:31, 35-36, and understood it as a deliberate

effort to evade the BALCO investigation generally, and the grand jury's inquiry regarding whether Anderson ever gave him injectable substances, specifically. Bonds's deceptive conduct before the grand jury cannot be equated with ordinary nonresponsive, but truthful, testimony. AOB:1, 38-39, 56. Any attentive observer may perceive if a witness's answer fails to address the question asked, and therefore, a prosecutor fairly bears the burden of pinning such a witness down. *Bronston v. United States*, 409 U.S. 352, 360 (1973). In contrast, investigators gathering evidence cannot be expected to know when an immunized witness testifying under oath is being deceptive.

(d) Statement C was material

Bonds also claims that Statement C was merely unresponsive and thus immaterial. AOB:33. Bonds's argument is based on the false premise that materiality is gauged solely by the content of the testimony at issue, rather than what that testimony tried to achieve. As Bonds himself notes, Statement C must be "[v]iewed in context." AOB:34. The district court correctly understood that, materiality must be assessed by what Bonds sought to withhold from the grand jury and whether that deprivation had the probable and natural consequence of obstructing, impeding, or influencing its investigation of BALCO's employees and Anderson. ER:14.

Whether Statement C is best characterized as false, misleading, or evasive, Bonds made it for the purpose of avoiding giving an answer to the grand jury's question whether Anderson had distributed any injectable PEDs to him, and deceiving the grand jury about what he knew of Anderson's criminal activities. The Supreme Court has explained that deception "in a formal proceeding is intolerable" because it may "put the factfinder . . . 'to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means.'" *ABF Freight Sys. v. NLRB*, 510 U.S. 317, 323 (1994) (quoting *United States v. Norris*, 300 U.S. 564, 574 (1937)); *see Brogan v. United States*, 522 U.S. 398, 402 (1998) ("We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function."). And as SA Novitzky testified, Bonds's testimony had potential to affect the investigation in "[m]any different ways." *See supra* pp. 20-21. Statement C was material.

II. SECTION 1503 IS NOT VOID FOR VAGUENESS AS APPLIED TO BONDS

A. Standard of review

This Court reviews de novo a vagueness challenge to the constitutionality of a statute. *United States v. Zhi Yong Guo*, 634 F.3d 1119, 1121 (9th Cir. 2011).

B. Section 1503 is not void for vagueness as applied to Bonds's case

Bonds argues that the Indictment was deficient because, as applied to his case, 18 U.S.C. § 1503 is void for vagueness. A statute does not violate the Fifth Amendment's guarantee of due process if it (1) defines the conduct it prohibits with sufficient definiteness, and (2) establishes minimal guidelines to govern law enforcement. *United States v. Shetler*, 665 F.3d 1150, 1164 (9th Cir. 2011).

A person of ordinary intelligence reading Section 1503 has "a reasonable opportunity to know" that it would apply to false, misleading, or evasive statements made directly to a grand jury for the purpose of impeding its investigation. *Id.* (internal quotation and citation omitted); *see Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (forbidding consideration of hypotheticals in analysis of whether statute is vague, as-applied). Law enforcement officials have sufficient guidance in enforcing the statute because they are constrained by the requirements that a defendant act with the intent to obstruct, influence, or impede a grand jury investigation, and that there be a nexus to such a proceeding. Section 1503 is not void for vagueness, as applied to Bonds, and the rule of lenity (AOB:33) therefore does not apply. *United States v. Dorsey*, 677 F.3d 944, 957 (9th Cir. 2012).

C. Section 1503 does not merely prohibit "out-of-court" misconduct

Bonds argues that Section 1503 was not intended to cover a witness's own testimony.[9] AOB:17-27. This interpretation has no support in the case law or legislative history.

1. The case law permits an obstruction of justice conviction to rest on a defendant's own testimony

Bonds cites *United States v. Aguilar*, 21 F.3d 1475 (9th Cir. 1994) (en banc), *rev'd in part*, 515 U.S. 593 (1995), for the proposition that whether a defendant's own testimony to a grand jury can ever constitute obstruction of justice under Section 1503 is an open question in this Circuit. AOB:25-26. But the Supreme Court's decision in *Aguilar* explicitly rejected the suggestion that false testimony to the grand jury itself would not be covered under Section 1503, noting that false testimony or documents given directly to the grand jury are "all but assure[d]" to be considered by the grand jury in its deliberations, and can be said to have the natural and probable effect of interfering with the due administration of justice, in violation of Section 1503. 515 U.S. at 601 & n.2; *see United States v. Ladum*, 141 F.3d 1328, 1338 (9th Cir. 1998); *cf. Norris*, 300 U.S. at 574 ("Perjury is an obstruction of justice . . . ."), *superseded on other grounds by statute*, 18 U.S.C. §

9/ Bonds makes this argument for the first time on appeal. *Compare* AOB:17 n.3 *with* CR:396.

1623(d). The Supreme Court's analysis was based on the broad language of Section 1503's catch-all clause. *Id.* at 598-99.

Even before *Aguilar*, this Court held that direct testimony can constitute an obstruction of justice. *United States v. Gonzalez-Mares*, 752 F.2d 1485, 1491-92 (9th Cir. 1985) (defendant's false statements made under oath to magistrate judge violated Section 1503); *cf. United States v. Thomas*, 612 F.3d 1107, 1130 (9th Cir. 2010) (upholding Section 1503 conviction based on defendant's false statements to grand jury). This is in line with what other Circuits have held. *United States v. Kumar*, 617 F.3d 612, 620-21 (2d Cir. 2010) (false testimony "plainly violated § 1503(a)" where testimony had a direct nexus to official government proceeding); *United States v. Brown*, 459 F.3d 509, 526-31 (5th Cir. 2006) (false denial of knowledge to grand jury can be the basis of Section 1503 conviction).

2. Section 1503's legislative history shows that Congress intended only to limit a court's summary contempt powers, not to limit the scope of acts prosecutable as obstruction of justice

Undeterred by case precedent, Bonds cites the statute's legislative history in support of his contention that Section 1503 reaches only "out-of-court misconduct." AOB:21.

The Supreme Court has "cautioned against allowing ambiguous legislative history to muddy clear statutory language." *Hall v. United States*, 132 S. Ct. 1882, 1892 (2012) (internal quotations and citation omitted). But even if Bonds were

correct that Section 1503 only reached "out-of-court misconduct," this would have no bearing on his case because he was charged with and convicted of lying to, misleading, and evading the *grand jury*, which belongs to no branch of the government, and acts independently of both the prosecutors and judge. *United States v. Williams*, 504 U.S. 36, 47-49 (1992). In any case, Section 1503's legislative history shows that Congress intended to criminalize all conduct that obstructs justice, and only to limit the district court's *summary* contempt powers to in-court conduct.

Section 1503 has its origins in the Contempt Act of March 2, 1831, which was "[i]ntroduced and enacted in the rush at the end of the session," without any record of debate. Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States – Since the Federal Contempt Statute*, 28 Colum. L. Rev. 525, 528 (1928). Congress passed the Contempt Act of 1831 in response to a dispute between a lawyer who published a critique of a federal judge's decision, and that judge, who summarily held the lawyer in contempt. Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts - A Study of Separation of Powers*, 37 Harv. L. Rev. 1010, 1023-25, 1033 (1924); Ronald Goldfarb, *The History of the Contempt Power*, 1961

Wash. U. L. Q. 1, 15 (1961); Walter Nelles & Carol Weiss King, *Contempt by Publication*, 28 Colum. L. Rev. 401, 430, 529-31 (1928).

The original bill contained only Section One of the Act, which restricted the court's power to inflict summary punishments for contempts to acts with a direct nexus to the court exercising summary power: (1) misbehavior "in the presence of said courts, or so [physically] near thereto as to obstruct the administration of justice"; (2) misbehavior by officers of the court in their official transactions; and (3) disobedience of a court's lawful orders. *See id.*; *Nye v. United States*, 313 U.S. 33, 47-48 (1941). A published critique of a court's decision would not be subject to summary punishment. The bill as passed contained a Section Two, which clarified that all other efforts to corruptly obstruct or impede the due administration of justice could still be prosecuted, but required "indictment" by grand jury. *Id.*

The two sections of the Act became separate statutes in 1873-74. Section One exists in amended form at 18 U.S.C. § 401. Rev. Stat. (1873) § 725, 18 Stat. 1. Section Two was codified as R.S. Sec. 5399 in 1873-74. Rev. Stat. (1873), 18 Stat.1. As such, it was simply made another criminal statute, with no redundant provision for prosecution by indictment. It was subsequently recodified as 18 U.S.C. § 241 in 1925-26, and as 18 U.S.C. § 1503 in 1948. 18 U.S.C. § 241 (1925-26); June 25, 1948, c. 645, 62 Stat. 769. As it currently stands, the first part of

Section 1503 specifically prohibits behavior aimed at grand or petit jurors and officers in or of federal courts. 18 U.S.C. § 1503. The second part of Section 1503 is referred to as the omnibus clause, a "catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice" that is "far more general in scope than the earlier clauses of the statute." *Aguilar*, 515 U.S. at 598. This omnibus language has survived over 180 years of recodification and amendment. June 8, 1945, ch. 178 § 1, 59 Stat. 234; Oct. 12, 1982, P.L. 97-291, § 4(c), 96 Stat. 1253. This Court has held that Section 1503 continues to cover conduct that is also specifically prohibited by other statutes. *Compare Ladum*, 141 F.3d at 1337-38 (Section 1503 continues to cover acts relating to witnesses after enactment of Section 1512, which specifically addresses the influencing of witnesses), *with* AOB:2-3, 32 (arguing that Section 1503 cannot overlap with Sections 1623 and 401).

Section 1503's legislative history shows that Congress intended it to be expansive in its prohibition of obstruction of justice. As the Fifth Circuit has stated, "'we doubt that the limitation on a federal judge's power to punish perjury summarily is also a limitation on the power to punish under § 1503'" and "'[we] see no reason . . . to depart from the natural construction of the statute by reading the restrictive law of summary contempt into § 1503.'" *United States v. Williams*,

874 F.2d 968, 979-81 (5th Cir. 1989) (quoting *United States v. Griffin*, 589 F.2d 200, 205-06 (5th Cir. 1979)).

The D.C. Circuit's 2-1 decision in *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), does not support Bonds's interpretation of Section 1503 either. AOB:25. *Poindexter*, which dealt with 18 U.S.C. § 1505, and which preceded *Aguilar*, itself observed that interpreting "corruptly" as only transitive ("A causes B to act corruptly") would render Section 1503's omnibus clause superfluous. 951 F.2d at 385; *see United States v. Russo*, 104 F.3d 431, 432, 435-36 (D.C. Cir. 1997) (upholding Section 1503 conviction based on defendant's grand jury testimony against Russo's "surprising proposition" that "lying to a grand jury with the intent to obstruct its investigation did not amount to a 'corrupt' obstruction of the due administration of justice").

Moreover, Congress moved to "correct" *Poindexter*'s "nonsensical interpretation of section 1505." Cong. Rec. § S11607-08 (daily ed. Sept. 27, 1996); Cong. Rec. S8938-40 (daily ed. July 25, 1996). In the False Statements Accountability Act of 1996, Congress clarified that it did not intend Section 1505 to apply only to acts done to others by defining "corruptly" in Section 1505 as "acting with an improper purpose, *personally* or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or

destroying a document or other information." 18 U.S.C. § 1515(b) (emphasis added); P.L. 104-292 § 3; *see United States v. Richardson*, 676 F.3d 491, 507 n.6 (5th Cir. 2012) (discussing *Poindexter*).

Given Congress's stated intent that Section 1515(b)'s definition of "corruptly" should bring Section 1505 "back into line with other Federal obstruction statutes," Section 1503's "corruptly" should be interpreted consistently with Section 1505 to include "personally" lying, misleading, or evading the grand jury's inquiry. Cong. Rec. § S11607-08 (daily ed. Sept. 27, 1996); Cong. Rec. S8938-40 (daily ed. July 25, 1996).

D. Section 1503 reaches more than false statements

Bonds argues that if a defendant's grand jury testimony may be the basis for a Section 1503 prosecution, that testimony must be literally false. AOB:23-32. Again, even if Bonds were correct, his conviction would stand, for, as discussed above, the evidence at trial showed that he repeatedly lied to the grand jury, and that he lied when he told the grand jury that he had a unique non-business friendship with Anderson that explained why he had no information pertinent to the grand jury's investigation. *Cf. United States v. Conley*, 186 F.3d 7, 15, 20 (1st Cir. 1999) (finding evidence that defendant's grand jury testimony was false sufficient to sustain Section 1503 conviction where he was charged with "giving false,

evasive, and misleading testimony and withholding information"). But Bonds is not correct. Section 1503 is not a perjury statute. It reaches corruptly made material statements that may be literally true but nonetheless mislead or evade in such a way as to impede the due administration of justice.

Section 1503 never mentions falsity, but covers any corrupt "endeavor[] to influence, obstruct, or impede" the due administration of justice. ER:198; 18 U.S.C. § 1503(a); *Aguilar*, 515 U.S. at 598-99; *see United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981). "[F]alse or misleading" statements can certainly be obstructive, but as Congress contemplated, so can the "withholding, concealing," or "altering" of "information." 18 U.S.C. § 1515(b); *Catrino v. United States*, 176 F.2d 884, 887 (9th Cir. 1949) ("The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.").

Indeed, this Court's decisions directly contradict Bonds's argument that literal falsity is necessary. In *Rasheed*, this Court held that causing subpoenaed documents to be destroyed constituted a violation of Section 1503. 663 F.2d at 852. The destruction of documents involved no literal falsity, but it violated Section 1503 because it "result[ed] in the improper suppression of evidence." *Id.*

In *United States v. Sherwood*, 98 F.3d 402, 415 (9th Cir. 1996), this Court found that the obstruction of justice enhancement under United States Sentencing Guidelines § 3C1.1 was mandatory, where Cuddy "was evasive in his answers," when testifying at his suppression hearing, "as if he was specifically attempting to suggest that he was not aware the detention center was taping his calls without specifically saying he was not aware they were taping his calls." Even if Cuddy's specific statements were not literally untrue, in sum they created a deceptive "[o]verall" "impression." *Id.*

The D.C., Second, Fifth, Tenth, and Eleventh Circuits are in agreement that a statement need not be literally false to obstruct justice. In *United States v. Safavian*, 528 F.3d 957, 967 (D.C. Cir. 2008), the D.C. Circuit held that a defendant may be guilty of obstruction of justice under Section 1505 if he makes a misleading statement that is literally true.

In *United States v. Langella*, 776 F.2d 1078, 1081 (2d Cir. 1985), the Second Circuit held that regardless of whether false statements to the grand jury could support a conviction for obstruction of justice under Section 1503, several of Langella's answers were "obviously evasive and constituted concealment of evidence," and fell squarely under the statute. *See also United States v. Biaggi*, 853 F.2d 89, 104-05 (2d Cir. 1988) (Section 1503 conviction could rest on Biaggi's

coaching witness "to withhold information and to give false, evasive, and misleading information," such as characterizing trip that was really bribe as "emanating simply from an old and dear friend's concern for Biaggi's health"); *United States v. Cohn*, 452 F.2d 881, 884 (2d Cir. 1971) ("blatantly evasive witness" who "erect[s] a screen of feigned forgetfulness" frustrates grand jury's "attempt to gather relevant evidence" "through use of corrupt or false means" "as surely" as "one who burns files").

The Fifth Circuit's cases are in accord. In *Griffin*, Griffin testified before the grand jury that he only knew Ebeling from the track and could not recall any conversations with him about a plane crash or money, when in fact the two had numerous conversations about money – related to loansharking activities – that was lost in a plane crash. 589 F.2d at 201-02. In upholding the conviction under Section 1503, the Fifth Circuit held that "[w]hether Griffin's testimony is described . . . as 'evasive' because he deliberately concealed knowledge or 'false' because he blocked the flow of truthful information is immaterial." *Id.* at 204. *See also Williams*, 874 F.2d at 981 & n.38 ("refus[ing] to attach significance to" "purported distinction" between "false denials of knowledge" and "evasive or a mere denial of memory," because both "clos[e] off" grand jury's inquiry into what witness "knew about the subject under investigation").

In *United States v. Browning*, 630 F.2d 694, 698-99 (10th Cir. 1980), the Tenth Circuit held that a Section 1505 obstruction of justice conviction was properly based on Browning's coaching a witness to give "incomplete and misleading answers to questions" asked by the Customs Service. Even if such answers were literally true, which they were not, "[t]he ultimate question . . . is not whether the defendant told the truth but whether the defendant obstructed or interfered with the process of truthfinding in an investigation in the process of enforcing the law." *Id*. at 699-700; *cf. United States v. Tranakos*, 911 F.2d 1422, 1430, 1432 (10th Cir. 1990) (upholding Section 1503 conviction upon evidence that defendant gave grand jury witness "elliptical suggestion" rather than "direct commands" to lie).

The Eleventh Circuit has reached the same conclusion. In *United States v. Perkins*, 748 F.2d 1519, 1521-22 (11th Cir. 1984), Perkins knew that Sweetie Marshall had died and that Ruye was posing as Sweetie Marshall in order to receive money from the insurance company. However, when asked whether he knew Sweetie Marshall, Perkins told the grand jury that he did not know Sweetie Marshall but he knew of the person they say is Sweetie Marshall, that he had done work for the one who was known as Sweetie Marshall, that Sweetie Marshall was a nickname, and gave a physical description of Sweetie Marshall that suggested he

was still alive. *Id.* at 1522 & n.7. The Court upheld Perkins's Section 1503 conviction, explaining that "a reasonable jury could have found that Perkins's answers were *evasive or false* in an effort to obstruct the grand jury's investigation." *Id.* at 1527-28 (emphasis added); *see also United States v. Petzold*, 788 F.2d 1478, 1485 (11th Cir. 1986) (upholding Section 1503 conviction where defendant was charged with creating false documents to "create [a] false and misleading impression" and "giving false, evasive and misleading testimony" to grand jury).

This is not to say that Section 1503 is unbounded in its reach. Section 1503 has two key limits. First, unless a jury finds the defendant acted with corrupt intent, it may not convict him of obstruction of justice, even if it otherwise finds the defendant made a false statement that had the effect of impeding a grand jury investigation. *Compare* 18 U.S.C. § 1503, *and Aguilar*, 515 U.S. at 599 (Section 1503 requires that "[t]he action taken by the accused must be with an intent to influence . . . grand jury proceedings"), *with* 18 U.S.C. § 1623 (requiring that defendant knowingly made false declaration), *and Bronston*, 409 U.S. at 359-62 (defendant's state of mind is "relevant only to the extent that it bears on whether 'he does not believe (his answer) to be true'" in false declaration crimes). Second,

Section 1503 reaches only obstructive behavior with a sufficient nexus to an existing judicial or grand jury proceeding. *Aguilar*, 515 U.S. at 599.

But within these two constraints, the precise method a defendant uses to block the flow of truthful information to the grand jury does not matter. *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982) (any conduct that "results in the corrupt and improper suppression of evidence" is covered by Section 1503); *Rasheed*, 663 F.2d at 852 (Section 1503 was "designed to proscribe *all* manner of corrupt methods of obstructing justice" (emphasis added)). Literal falsity is not a requirement.

III. THE INDICTMENT PROVIDED BONDS WITH ADEQUATE NOTICE OF THE SECTION 1503 CHARGE, AND WAS NOT CONSTRUCTIVELY AMENDED BY THE JURY INSTRUCTIONS

A. Standard of review

This Court reviews de novo the determination that an indictment gives sufficient notice of the charges to be brought at trial. *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009). This Court reviews a constructive amendment claim de novo as well. *United States v. Hartz*, 458 F.3d 1011, 1019 (9th Cir. 2006).

B. Background

Incorporating factual allegations made elsewhere in the Indictment, Count Five charged that "[o]n or about December 4, 2003," Bonds "did corruptly

influence, obstruct, and impede, and endeavor to corruptly influence, obstruct, and impede, the due administration of justice, by knowingly giving material Grand Jury testimony that was intentionally evasive, false, and misleading, including but not limited to the false statements" he made, as charged in Counts One through Four, all in violation of 18 U.S.C. § 1503. ER:198.

Bonds moved to dismiss Count Five, or to strike the words "but not limited to" as surplusage, arguing that to the extent it was based on statements other than those charged in the false statement counts, the charge gave him inadequate notice and compromised his right to a unanimous verdict absent specification of the factual bases for conviction. *See* CR:194. Bonds also argued that the government's proposed jury instructions listing statements other than those charged in the false statement counts, including Statement C (then Statement F), would constructively amend the indictment. *See* CR:194, 203, 209.

The district court denied Bonds's motion. ER:21-24. It noted that Bonds had raised a similar challenge to a previous iteration of Count Five that was, for all relevant purposes, identical. ER:22. The government had argued that "the theory behind" the obstruction count was that Bonds's grand jury testimony "as a whole was so evasive and perjurious that it constituted obstruction of justice." ER:230-31. The count did not rest on "individual questions and answers." ER:230. The

district court had agreed that the count "rests solely on defendant's grand jury testimony, and this basis provides defendant with adequate notice of the charges against him." ER:28.

In its February 15, 2011, order denying Bonds's motion, the district court reiterated that Count Five "charges defendant with obstructing justice by means of his December grand jury testimony," and gave Bonds sufficient notice of "what he must be prepared to meet" at trial. ER:23. Nor did the jury instructions risk constructive amendment. Bonds was indicted "for obstructing justice through his Grand Jury testimony generally," and "[a]ny jury instruction or verdict form that contains specific statements from defendant's Grand Jury testimony will serve to *narrow* the permissible grounds for conviction, not to amend the indictment." ER:24 (original emphasis). Moreover, the statements served a different function than the indictment, and were to "guide the Petit Jury in its deliberations and guarantee that they agree unanimously as to how defendant obstructed justice." ER:23-24.

During the charging conference, the district court asked the government to justify how the trial evidence showed statements offered as examples of obstructive testimony were obstructive. SER:118-19. With respect to Statement C (then

Statement D), however, the district court said, "You don't have to say anything. I'm inclined to give [it]." SER:120.

The final instructions to the jury required it to acquit Bonds of Count Five unless the government proved the elements beyond a reasonable doubt, and unless the jury also unanimously agreed "that one or more of the following [seven] statements," including Statement C, "was material and intentionally evasive, false, or misleading, with all of you unanimously agreeing as to which statement or statements so qualify." SER:10-11.

C. The Indictment was sufficient

An indictment meets the requirements of the Due Process Clause if it (1) sets forth the elements of the charged offense and fairly informs a defendant of the charge against which he must defend and (2) enables him to bar future prosecutions for the same offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *Hamling v. United States*, 418 U.S. 87, 117-18 (1974); *see also* Fed. R. Crim. P. 7(c)(1). An indictment that "'conforms to minimal constitutional standards'" is sufficient even if "'it could have been framed in a more satisfactory manner.'" *Awad*, 551 F.3d at 935 (quoting *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000)).

"[R]ead in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied," Bonds's Indictment was sufficient. *United States v. King*, 200 F.3d 1207, 1217 (9th Cir. 1999). Citing "18 U.S.C. § 1503 – Obstruction of Justice," the Indictment tracked the statutory language and stated all of the elements of Section 1503. ER:198; *see Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862 (9th Cir. 2008) (listing elements); *Thomas*, 612 F.3d at 1129 (finding that materiality is element of Section 1503). This case is nothing like *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999), AOB:53, which held that "if properly challenged prior to trial, an indictment's complete failure to recite an *essential element* of the charged offense is . . . a fatal flaw requiring dismissal of the indictment." *Du Bo*, 186 F.3d at 1178 (emphasis added)

The Indictment also gave Bonds clear notice of the facts underlying the obstruction charge: "knowingly giving material Grand Jury testimony that was intentionally evasive, false, and misleading" on December 4, 2003. ER:198; *see* ER:27-28. Years before the Indictment's return, the district court had interpreted this language to mean Bonds's grand jury testimony generally. ER:28, 190.

By incorporating the previous paragraphs of the Indictment, the charge also gave Bonds notice that the specific testimony at issue concerned his "knowledge and involvement with Balco," Conte and "any relationship [he] had with [Greg]

Anderson," in relation to the federal investigation of "distribution of anabolic steroids and other illegal performance-enhancing drugs and the related money laundering of proceeds from the drug distributions." ER:193-95, 198; *see United States v. Blinder*, 10 F.3d 1468, 1476 (9th Cir. 1993) (indictment was sufficient because "taken as a whole," it "reveals in great factual detail the elaborate scheme to defraud . . . and incorporates the factual allegations in each of the four counts").

Further, the Indictment gave the statements charged in Counts One through Four as examples of Bonds's obstructive testimony. ER:198. These charged statements, set forth in excerpted questions and answers, pertained to four topics of the grand jury's inquiry: whether (1) Bonds knew of Anderson giving him steroids; (2) Anderson and his associates ever injected Bonds; (3) Anderson ever gave Bonds HGH; and (4) prior to the 2003 baseball season, Anderson ever asked Bonds to take anything other than vitamins. ER:195-98.

In fact, Bonds gave Statement C during the same line of questioning that he gave the statement charged as false in Count Two. The portion of the grand jury testimony excerpted in Count Two began with the question, "Did Greg ever give you anything that required a syringe to inject yourself with?" and included the beginning of Bonds's answer about his friendship with Anderson. ER:196, 301-02. The Indictment put Bonds on notice that the government's theory was that

statements denying receipt of injectable substances were false, and statements in service of that lie, even if not literally false, were misleading, or evasive. *See United States v. Rosi*, 27 F.3d 409, 415 (9th Cir. 1994) (indictment not deficient for failing to list states between which stolen money was alleged to have been transported, where grand jury could have based its charge on other states).

This is in sharp contrast to *Russell v. United States*, 369 U.S. 749 (1962), which dealt with 2 U.S.C. § 192. *See* AOB:50-51. The defendants in *Russell* were charged with refusing to answer a question pertinent to a Congressional inquiry, but the indictment failed to state what the inquiry was. *Id.* at 752-53. Without knowing that, the grand jury had no way of gauging whether there was probable cause that the defendants had violated the statute, or simply refused to answer an irrelevant question. *Id.* at 757. Bonds's Indictment left no such ambiguity about the "core of criminality." *Id.* at 764.

D. There was no constructive amendment

The district court's jury instructions allowing the jury to find Statement C was obstructive did not constructively amend[10] the Indictment. The grand jury that

---

10/ Bonds does not complain of a variance, and so waives this argument. *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). In any case, the trial evidence did not prove facts materially different from that alleged in the Indictment.

returned the Indictment found probable cause that Bonds's grand jury performance was false, misleading, and evasive. It was not asked to identify specific statements or portions of Bonds's testimony as examples, and could rely on any portion or the whole of Bonds's testimony. By instructing the petit jury that it could only find Bonds guilty if it found one or more of seven specified statements obstructive, the district court narrowed the Indictment. Under *United States v. Miller*, 471 U.S. 130, 135 (1985), such narrowing does not constitute a constructive amendment.

Contrary to Bonds's attempts to interpret it as such, Count Five did not charge him with the act of obstructing justice through particular statements he made to the grand jury, but through "intentionally evasive, false, and misleading" material grand jury testimony generally. ER:198; *cf. Gebhard v. United States*, 422 F.2d 281, 289-90 (9th Cir. 1970) (finding that repeated instances of same lie should not be charged in separate perjury counts). The Indictment's reference to the statements in Counts One through Four merely clarified that even though they were charged as false statements, they were not excluded from the scope of the testimony charged as obstructive. Bonds obstructed justice throughout his grand jury testimony, "including but not limited to" these false statements.

The government's arguments to the jury were consistent with this theory of Count Five. In opening, the government forecast that the evidence would show

that Bonds told a "double lie, a two stage lie," that consisted of denying that Anderson ever distributed steroids to him, and selling the grand jury a "story" about how Anderson told him steroids was flax seed oil and arthritis cream. SER:580-81.

In closing, the government argued that Bonds "obstructed justice when he sought *again and again* to avoid answering questions about injections, about these topics by citing his friendship with Greg Anderson and by providing not outright false testimony, but basically misleading statements in connection with the questions he was asked." ER:69 (emphasis added). Bonds's "account" that he had taken items unwittingly was "false" and "implausible on its face." ER:70. When faced with questions such as "getting injected," Bonds "either denied them or he tries not to answer the question." *Id.* The government also urged the jury to "look at the entire grand jury transcript" to assess whether Bonds had obstructed justice. ER:127. "You read his answers, the defendant's answer in the grand jury transcript with that in mind, every single answer." ER:140. Bonds "wanted to sell a little lie" – that Anderson told him that he was just using flax seed oil – to "distract everybody" from "the big lie" that he had been using steroids provided by Anderson for years. ER:149-50.

The jury instructions proceeded on the same theory as the Indictment. The petit jury could only find Bonds guilty of obstructing justice if it found that Bonds knowingly gave material testimony on December 4, 2003, to the grand jury that was intentionally evasive, false, and misleading. The petit jury considered all of Bonds's December 4, 2003, grand jury testimony, including Statement C, in the context of all the evidence presented at trial, and was satisfied beyond a reasonable doubt that all of the elements for Section 1503 were met.

The jury instructions' additional requirement that the jury unanimously agree on which statement(s) were examples of the obstructive testimony only narrowed the Indictment, which the Supreme Court made clear in *Miller* is not a constructive amendment. 471 U.S. at 135.

United States v. Wilbur, 674 F.3d 1160, 1178 (9th Cir. 2012), is instructive. The defendants were charged with conspiring to traffic in contraband cigarettes, "at least from in or about July 1999, and continuing through on or about May 15, 2007." *Id.* at 1169. This Court found that the defendants' conviction was based on a conspiracy that took place between 2005 and 2007, instead of 1999 and 2007, as charged. *Id.* at 1176-77. However, this did not constitute a constructive amendment of the indictment because the "government has not offered proof of facts different from those set forth in the indictment," and the difference was not a

broadening, but simply a "narrowing" of the indictment. *Id.* at 1178-79. Similarly, in this case, the Indictment charged and the trial presented the same set of facts – Bonds's deception during his grand jury testimony. The jury instructions at most narrowed the Indictment by requiring the jurors to unanimously agree that at least one of seven enumerated statements was obstructive.

Stirone v. United States, 361 U.S. 212 (1960), does not support Bonds's contention that the Indictment was constructively amended. AOB:52. That indictment charged Stirone with violating the Hobbs Act by extorting money from Rider, which affected interstate shipments of sand used at Rider's concrete-mixing plant. 361 U.S. at 213-14. At trial, however, the jury was instructed that it could find the element of interference with interstate commerce satisfied either by the sand theory as charged, or by finding that Stirone's extortions affected interstate shipments of steel because Rider's concrete was used to construct a steel mill. *Id.* at 214. The Supreme Court held that this constituted a constructive amendment of the indictment because there was no way of knowing if "the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete." *Id*. at 217.

As this Court explained in *United States v. Antonakeas*, 255 F.3d 714, 722 (9th Cir. 2001) (internal quotations and citation omitted), *Stirone* is limited to

"cases in which the prosecution presents a complex of facts distinctly different from that set forth in the charging instrument." *See Miller*, 471 U.S. at 138-39 (*Stirone* concerned a jury instruction that "*broaden*[*ed*] the possible bases for conviction from that which appeared in the indictment" (original emphasis)). It is therefore completely different than this case.

In fact, the requirement that the jury unanimously agree on an example of Bonds's obstructive conduct was, under this Court's precedent, an unnecessary extra hurdle for the prosecution. *See Schad v. Arizona*, 501 U.S. 624, 632 (1991) (petit jurors need not agree upon single means of commission); *United States v. Hofus*, 598 F.3d 1171, 1175 (9th Cir. 2010) (jurors could disagree as to what actions constituted defendant's substantial step in his attempt to violate 18 U.S.C. § 2422, for this was "differences only of means"); *United States v. McCormick*, 72 F.3d 1404, 1409 (9th Cir. 1995) (jury did not have to reach consensus on which particular false statement satisfied element).

In *United States v. Hartz*, 458 F.3d 1011, 1019-23 (9th Cir. 2006), Hartz was charged in Count Three of a firearm offense, and the indictment alleged two specific models of firearms were involved. *Id.* at 1016. A special verdict form asked the jury to unanimously find (1) whether Hartz had brandished "a firearm," and (2) which of the two firearms mentioned in the indictment was used. *Id.* at

1016. The jury found that Hartz had brandished "a firearm," but was not able to agree on which firearm. *Id.*

Hartz argued that the special verdict form constructively amended the indictment. *Id.* at 1019. This Court disagreed, explaining that the language in Hartz's indictment describing the specific firearms was "surplusage, rather than an essential element of the crimes." *Id.* at 1021. Moreover, the difference between the indictment and jury instructions was at most a harmless variance because, given that all of the evidence before the jury was of the two guns alleged in the indictment, it "did not alter the behavior for which Hartz could be convicted." *Id.* at 1020-22 & n.9. The Court also found that the jury did not have to unanimously find which firearm was used in the crime, but simply had to be unanimous that the firearm used was "*either*" one "*or*" the other charged. *Id.* at 1022 n.9 (original emphasis).

In this case, similarly, the jury instructions did not allow Bonds to be convicted on the basis of different behavior than that alleged in the Indictment. The grand jury found probable cause that Bonds's December 4, 2003, testimony was obstructive; the petit jury found that it was obstructive, beyond a reasonable doubt. The jury instruction's specific unanimity requirement asked what *Hartz* called "the wrong question." 458 F.3d at 1022 n.9. There was no genuine

possibility of jury confusion or that a conviction would occur as the result of different jurors concluding that Bonds committed different offenses, because the sole question was whether Bonds's December 4, 2003, grand jury testimony had been obstructive. *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007).

That the government agreed to the additional unanimity requirement, SER:117, undoubtedly made it harder for the jury to return a guilty verdict. This Court should resist Bonds's efforts to transform the boon of this shield against conviction by jury into a sword to obtain reversal on appeal.

IV. THE DISTRICT COURT'S JURY INSTRUCTIONS WERE NOT DEFICIENT

A. Standard of review

This Court reviews de novo whether the district court's jury instructions accurately stated the law, but reviews the formulation of the jury instructions deferentially for abuse of discretion. *United States v. Stinson*, 647 F.3d 1196, 1215 (9th Cir. 2011). Any single instruction to the jury must be viewed in the context of the instructions as a whole. *United States v. Houston*, 648 F.3d 806, 818 (9th Cir. 2011).

B. The district court did not abuse its discretion in rejecting Bonds's "totality" language, and any error was harmless

The district court did not abuse its discretion in refusing to adopt Bonds's "totality" language.

"So long as the instructions fairly and adequately cover the issues presented, the judge's formulation of those instructions or choice of language is a matter of discretion." *United States v. Echeverry*, 759 F.2d 1451, 455 (9th Cir. 1985). The adequacy of an instruction must be analyzed in the context of the jury instructions in their totality, and in the context of the whole trial. *United States v. Rohrer*, 708 F.2d 429, 431-32 (9th Cir. 1983).

Here, Bonds's only complaint is that the jury instructions for Count Five did not include the italicized portion:

> 3. by knowingly giving material testimony that, *when considered in its totality*, was intentionally evasive, false, or misleading.

AOB:54-55; *compare* ER:171 (italics added) *with* SER:10. The district court rejected this language as suggesting something "slightly different" than what the district court had held – that the Indictment had charged Bonds "with the entirety of [his] testimony, so [he had] been given notice of every subset of the testimony." SER:116, 121. The district court did not abuse its discretion. Bonds's "totality"

language had the potential to confuse the jury into believing that a guilty verdict required finding every single statement in Bonds's grand jury testimony was false, misleading, or evasive. *See* ER:16-17.

At trial, Bonds complained that without the "totality" language he requested, the jury might be prevented in finding that a statement that seemed false or misleading "in isolation" was not actually obstructive when read "in the totality" of Bonds's grand jury testimony. SER:114. But the jury instructions as a whole made clear that the jury should "consider[] *all* the evidence." SER:13 (emphasis added), 586. Bonds could only be found guilty of obstruction of justice if the jury found that he gave material testimony that was "intentionally" evasive, false, or misleading, with and for "the purpose of obstructing justice." SER:10, 588. In determining whether a witness was truthful, the jury could "take into account" the witness's "opportunity and ability to see or hear or know the things testified to," "memory," "interest in the outcome of the case, if any," "bias or prejudice, if any"; "whether other evidence contradicted the witness's testimony"; "whether the witness made any prior statements that were inconsistent with what the witness said while testifying"; "the reasonableness of the witness's testimony in light of all the evidence"; and "any other factors that bear on believability." SER:4, 591. The jury was adequately instructed to appraise Bonds's grand jury testimony in context.

ER:17. The district court did not abuse its discretion in leaving the proposed language out of its nearly identical instruction. Given that the government urged the jury to "look at the entire grand jury transcript," ER:127, the jury did examine the entire grand jury transcript, ER:17, and Statement C was obstructive in the context of the entire grand jury transcript, any instructional error was harmless.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court affirm the district court's judgment.

DATED: July 19, 2012

Respectfully submitted,

MELINDA HAAG
United States Attorney

BARBARA J. VALLIERE
Chief, Appellate Division

/s/ Merry Jean Chan
MERRY JEAN CHAN
Assistant United States Attorney

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6(a) of the United States Court of Appeals for the Ninth Circuit, counsel for Plaintiff-Appellee hereby states that she is aware of the following cases related to this appeal:

United States v. Anderson, C.A. No. 11-10147 (recalcitrant witness appeal of district court's contempt finding and commitment order for refusal to testify at Bonds's trial).

United States v. Bonds, C.A. No. 09-10079 (government appeal of district court's suppression ruling).

United States v. Anderson, C.A. No. 06-16572 (recalcitrant witness appeal of district court's contempt finding and commitment order for refusal to testify before the Grand Jury in its investigation of Bonds).

United States v. Thomas, C.A. No. 08-10450 (defendant appeal of convictions for perjury and obstruction of justice based on grand jury testimony in BALCO investigation).

United States v. Comprehensive Drug Testing, Inc., C.A. Nos. 05-10067, 05-15006, 05-55354 (government appeal of district court's suppression ruling).

None of these cases are currently pending in this Court.

Dated: July 19, 2012

/s/ Merry Jean Chan
MERRY JEAN CHAN
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that:

_X_ Pursuant to Fed. R. App. P. 32 (a)(7)(B(i) and Ninth Circuit Rule 32-1, the attached answering brief is:

_X_ Proportionately spaced, has a typeface of 14 points or more and contains 13, 989 words or less; or,

___ Monospaced, has 10.5 or fewer characters per inch, and contains ____words or _____ lines of text

Dated: July 19, 2012

/s/ Merry Jean Chan
MERRY JEAN CHAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2012, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that the Government's Supplemental Excerpts of Record in the same action were served on the party or parties listed below via Federal Express service:

Dennis P. Riordan, Esq.
Donald M. Horgan, Esq.
Riordan & Horgan
523 Octavia Street
San Francisco, CA 94102

Allen Ruby, Esq.
Skadden, Arps, Slate, Meagher & Flom, LLP
525 University Avenue, Ste. 1100
Palo Alto, CA 94301

Christina C. Arguedas, Esq.
Arguedas, Cassman & Headley, LLP
803 Hearst Avenue
Berkeley, CA 94710

Ted Sampsell Jones
William Mitchell College of Law
875 Summit Ave.
St. Paul, MN 55105

/s/ Hui Chen
Hui Chen, Legal Assistant

ADDENDUM

TABLE OF CONTENTS

Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 73. Obstruction of Justice (Refs & Annos)

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is--

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.