No. 11-10669

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Barry Lamar Bonds,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District Court No. 07-CR00732-SI

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The government's case on Count Five was presented to the petit jury on the theory that Mr. Bonds had obstructed justice by means of one or more of seven statements before the grand jury. The government claimed that three of those seven statements were knowingly false, also charging them as such in Counts One, Two, and Three. The government argued to the jury that the other four statements, listed as A, B, C, and D in the district court's instructions, were not false but were obstructive because they were intentionally and materially evasive of the questions asked by prosecutors.

The jury, however, declined to convict on the basis of the purportedly evasive statements contained in A, B, and D and the purportedly false statements contained in Counts One, Two, and Three. It was no doubt a bitter disappointment to the government that Mr. Bonds was convicted solely on the basis of Statement C, but that was the jury's verdict, and if his conviction is to be upheld, it must be on the ground that Statement C was sufficiently obstructive of the grand jury's inquiry to constitute the offense defined by 18 U.S.C. § 1503.

Statement C, which followed a question as to whether Greg Anderson had given Mr. Bonds anything to inject himself with, contained rambling testimony about being a celebrity child. In his opening brief, Mr. Bonds demonstrated that

Statement C did not violate § 1503 because it did not fall within the ambit of that statute, and in any case was neither evasive of, nor material to, the grand jury's inquiry. Immediately after his description of his pedigree, Mr. Bonds directly, repeatedly, and truthfully answered the prosecutors' questions concerning self-injection. Furthermore, the supposedly evasive portion of Statement C was not even mentioned in the indictment, and the district court's instructions on the Count Five offense were plagued by error.

The government's responding brief ("GB") is an impressive work of misdirection and artful framing. It contains no argument that the core of Statement C—Mr. Bond's description of being the child of a celebrity father—was evasive. Moreover, as demonstrated below, the government effectively concedes the prosecution's failure to prove materiality. Unable to defend the theory on which Mr. Bonds was convicted of obstruction, the government pretends he was convicted on other theories that were neither presented nor proved to the jury and then proceeds to defend those unproven allegations as appropriate grounds for affirmance. But the government cannot cure its failure at trial by demanding that this Court make factual findings on appeal that the jury did not.

In going to great lengths to avoid defending the jury's actual verdict, the government demonstrates that the theory on which it obtained a conviction does

not withstand scrutiny. Reversal is required.

I. THE OBSTRUCTION STATUTE DOES NOT COVER TRUTHFUL STATEMENTS

A. Standard of Review and Hung Counts

This was a case about lying under oath, but the government was unable to prove any lie to the jury. The only theory on which it obtained a conviction was the Statement C obstruction theory. Given the glaring deficiencies of that theory, the government attempts to revive its perjury theories on appeal. It repeatedly suggests that "this Court must view Bonds's grand jury testimony as false where this view is supported by evidence and favors the prosecution." (GB at 25.)

Indeed, the government appears to advance the remarkable proposition that the sufficiency standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), should be applied to the counts on which the jury hung. (GB at 24-26.) But there is absolutely no legal authority supporting such a proposition. The *Jackson* standard applies to guilty verdicts—it applies to counts of conviction. *See United States v. Nevils*, 598 F.3d 1158, 1163 (9th Cir. 2010) (en banc) ("[T]he constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia* . . . ."). The government cannot cite a single case where this Court or any court has applied the pro-prosecution *Jackson* standard to counts on which the jury

failed to reach a verdict.

Instead of relying on any cases dealing with sufficiency, the government relies on the Supreme Court's double jeopardy decision in *Yeager v. United States*, 557 U.S. 110 (2009). The Court in *Yeager* held that "consideration of hung counts has no place in the issue-preclusion analysis." *Id*. at 122. In so ruling, it warned that "conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." *Id*.[1] Mr. Bonds was not convicted of the falsehoods alleged in Counts One, Two, and Three, so this Court cannot assume that his testimony underlying those counts was false. As the Court said in *Yeager*, the jury's "failure to reach a verdict cannot . . . yield a piece of information that helps put together the trial puzzle." *Id*. at 121. The government's extensive reliance on supposed evidence of guilt on the other counts must therefore be ignored. Implications of guilt from the hung counts cannot be used to complete the puzzle for Count Five.

B. The Truthfulness of Statement C

The prosecutor's question that preceded Statement C was "Did Greg ever

[1] The government obliquely and ominously suggests that the jury may have failed to return a verdict "for impermissible reasons." (GB at 25.) That is precisely the sort of jury-room conjecture criticized by *Yeager*.

give you anything that required a syringe to inject yourself with?" (ER 158 [instructions]; ER 301-02 [grand jury testimony].) While Statement C did not directly answer that question, in response to follow-up questions put to him immediately thereafter, Mr. Bonds directly stated that neither Anderson nor Stan Conte had given him a liquid to inject himself and that he had never injected himself with anything. (ER 302, 303, 306, 308.) The government presented absolutely no evidence that Mr. Bonds had been given anything to inject himself or that he had done so.

The government nonetheless contends on appeal that Statement C was literally false by disregarding all sentences in the Statement but the first one and claiming that, in referring back to a prior comment that he did not discuss "business" with Anderson, Mr. Bonds lied when he said: "That's what keeps our friendship." (GB at 27-29.) The government contends that the jury might have concluded that "[k]eeping out of each other's personal lives and business was not the basis for Bonds's relationship with Anderson," (*id*. at 27), and therefore found Mr. Bonds guilty of intentionally lying on that basis. But this new theory of guilt fails because, as the district court held, it is unsupported by evidence and was never presented to the jury.

First, the government presented no evidence that Mr. Bonds lied when he

described the foundation of his friendship with Mr. Anderson. In the portion of testimony immediately preceding Statement C, Mr. Bonds testified that (1) he and Mr. Anderson did not get into each others' personal lives; (2) with his friends, he preferred to talk about fishing and "other stuff" rather than baseball; and (3) he didn't talk about Anderson's business. He then concluded "That's what keeps our friendship."

As the district court ruled, the government did not prove that any of this was false, in part due to the insoluble ambiguity of the colloquial use of the word "business."[2] That problem aside, the government did not present evidence that Mr. Bonds and Mr. Anderson did, in fact, get into each other's personal lives. The trial record is devoid of evidence that Mr. Bonds did, in fact, prefer to discuss baseball rather than fishing with his friends. The government did not call any witness who testified that Mr. Bonds did, in fact, talk regularly about Mr. Anderson's personal training business. Even in the abstract, the idea that the federal government can disprove a person's opinion about the proper foundations of a good friendship is laughable.

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[2] The district court observed: "[T]here are other ways to understand defendant's testimony, and in particular his use of the phrase 'other people's business,' which can mean different things, and which in this case does not necessarily refer to the 'business' of athletic training or the 'business' of distribution and use of performance enhancing drugs." (ER 12 n.5.)

Second, lack of evidence aside, this new theory of guilt cannot succeed because it was never once suggested at trial. To the contrary, the government explicitly and repeatedly *conceded* that Statement C was not literally false. Before the district court, it stated that the uncharged lettered statements were "not charged as an outright falsehood under the perjury statute" because they were "sort of kind of an evasive or misleading" testimony. (SER 119.) The government represented: "[W]e would have charged him as a 1623 count if we were saying these are all false. These are in the evasive and/or misleading category." (ER 165.1.)

The government similarly conceded literal truthfulness to the jury in its closing argument. The prosecutor that Mr. Bonds "obstructed justice…by citing his friendship with Greg Anderson and *by providing not outright false testimony*" but rather by evading the question. (ER 69, emphasis added.) As to Statement C in particular, the government never argued to the jury that it was false. Instead, it argued that "this answer goes off into the cosmos" because Mr. Bonds was "refusing to answer the question." (ER 116.) The government never once suggested at trial that Mr. Bonds lied when he said: "That's what keeps our friendship."[3] As a result, Mr. Bonds had no reason or opportunity to present

[3] Significantly, in support of the new argument that the first sentence of Statement C was false, the government points to the *absence* of evidence that Bonds and Anderson had a friendship outside of their business with each other.

evidence or argument that his testimony describing his friendship with Anderson was truthful. It was because "the government did not argue this reading to the jury" that the district court refused to consider "the government's explanation of how defendant's Statement C might have been false." (ER 12 n.5.)

In part to protect a defendant's right to present contrary evidence, both the Supreme Court and this Court have repeatedly emphasized that a court reviewing a conviction may not affirm on a theory never presented to the jury. *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991); *United States v. Dann*, 652 F.3d 1160, 1170 n.3 (9th Cir. 2011); *see Chiarella v. United States*, 445 U.S. 222, 236 (1980) ("We cannot affirm a criminal conviction on the basis of a theory not presented to the jury."). The government cannot present on appeal a theory that is unsupported by the evidence and that the government disclaimed at trial.

C. The History of the Obstruction Statute

Mr. Bonds's opening brief establishes that the omnibus clause of § 1503, originally passed as the Contempt Act of 1831, was never intended to cover a witness's in-court testimony. Rather, it was aimed at out-of-court attempts to

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(GB at 17-18.) But even were this new theory cognizable—and it is not— it was obviously the *government's* burden to establish that no such friendship existed. Again, never having conceived of this theory at trial, the government presented no evidence to support it before the jury.

threaten or bribe jurors or witnesses.[4] The government warns against reliance on "ambiguous legislative history," (GB at 37), but there is nothing ambiguous about the history of the omnibus clause. The government presents absolutely no evidence that the statute was intended to cover witness testimony.

The contemporaneous legislative history—cited by Mr. Bonds, but ignored by the government—demonstrates that the Section 2 of the Contempt Act was intended to punish "attempts to corrupt or intimidate jurors." *National Intelligencer* (Washington D.C.), March 3, 1831, at 3. Without any authority, the government nonetheless asserts that Section 2 had a far broader purpose:

> 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*.

(GB at 39.) The government's violation of legal citation rules makes it impossible to know what the "*Id*." is intended to refer to, but it is utterly false to suggest that Section 2 of the Contempt Act of 1831 covered "all other efforts" to impede the due administration of justice.

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[4] The government complains that Mr. Bonds did not cite this historical material below. (Govt. Brief at 36 n.9.) But parties are permitted to raise new arguments in support of the same claim on appeal. *Lebron v. NRPC*, 513 U.S. 374, 379 (1995). Mr. Bonds's claim has always been the same: that the obstruction statute does not cover his conduct.

Every legal historian to examine the Contempt Act has concluded that Section 2 was intended to cover only "corrupt overtures, out of court, to judges, jurors or witnesses."[5] Every court that has actually examined the history of the statute has reached the same conclusion. *See, e.g.*, *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. Essex*, 407 F.2d 214, 217 (6th Cir. 1969). The government offers no basis for a contrary conclusion regarding the statute's history.

D. The Import of Section 1515(b)

The history of § 1503 is damaging to the government's case, so it pivots and makes a novel argument that the statute was expanded when Congress enacted § 1515(b). The government's argument is certainly inventive, since § 1515(b) does not mention § 1503.

Congress enacted § 1515(b) after the *Poindexter* decision. It wanted to ensure that false statements to Congress were covered by § 1505, the obstruction statute for congressional proceedings. Section 1515(b) states:

> As used in section 1505, the term 'corruptly' means 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

[5] Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States—Since the Federal Contempt Statute*, 28 Colum. L. Rev. 525, 531 (1928).

other information.

The amendment, by its express terms, was limited to § 1505. *See United States v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999) ("[T]hat amendment, which is not itself directly applicable to section 1503, turns out to have a very narrow purpose."). To extend that provision to § 1503, this Court would have to ignore its plain meaning.

There no legislative history suggesting that Congress also meant to expand the definition of "corruptly" in § 1503. Moreover, under this Court's application of the *expressio unius* canon, Congress's failure to list § 1503 raises a presumption that it meant to exclude that section from its amendment. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992). And indeed, no federal court has ever held that the expanded definition of § 1515(b) can be applied to § 1503.

Even if § 1515(b) could be applied to § 1503, it would not reach Mr. Bonds's conduct in this case. Section 1515(b) covers false and misleading statements. It does not cover a temporary failure to answer a question. It does not criminalize rambling under oath. Finally, and at an absolute minimum, if § 1515(b) described the scope of criminality under § 1503, then Mr. Bonds would have been entitled to a jury instruction based on § 1515(b). The government cannot retroactively base liability on a statute that was never alleged in the

indictment, never mentioned at trial, and never presented to the jury.

E. Truthful Statements Under Section 1503

The government argues that although Statement C may have been truthful, it could still be obstructive. It marshals several cases that it claims support its position. Two propositions bear emphasis at the outset. First, the government cites no Ninth Circuit cases even suggesting that truthful testimony can violate § 1503. Second, the government cites no case from any court actually affirming a § 1503 conviction based on truthful testimony. Instead, the government cites several cases that it claims implicitly support its legal position. But even to establish that weaker claim, the government is forced to egregiously distort the facts and holdings of those cases.

1. *Sherwood*

The government claims that in *United States v. Sherwood*, 98 F.3d 402 (9th Cir. 1996), this Court held that truthful but evasive answers violate the obstruction provision of the Sentencing Guidelines. That is false—*Sherwood* involved false statements. In *Sherwood*, "[t]he district court found that [the defendant] made false statements at his suppression hearing." *Id*. at 415. This Court affirmed: "the district court did not err in finding that [the defendant] made false statements at his suppression hearing." *Id*.

2. *Safavian*

The government claims that in *United States v. Safavian*, 528 F.3d 957 (D.C. Cir. 2008), the D.C. Circuit held that literally truthful statements violate § 1505 if they are misleading. That is false—Safavian was convicted on the basis that he lied to investigators, and the D.C. Circuit reversed his conviction because the district court refused to admit defense evidence that his statements were factually true. *Id*. at 966-67. In arguing for harmlessness, the government argued that literal truth was irrelevant because truthful but misleading statements could obstruct justice. The D.C. Circuit rejected that argument because it held that even if literal truth were not a "complete defense," it was nonetheless critically important because if a jury found that the statements were truthful it would have been much less likely to find them misleading and obstructive. *Id*. at 968.

Moreover, *Safavian's* suggestion that truth is not a complete defense to a § 1505 charge was based entirely on the "false or misleading" provision in § 1515(b). As discussed above, that provision cannot be applied to § 1503. In part for that reason, cases interpreting § 1505 have limited applicability to this case.

3. *Langella*

The government claims that in *United States v. Langella*, 776 F.2d 1078 (2d Cir. 1985), the Second Circuit held that evasive answers violate § 1503 regardless

of truthfulness. That is false—*Langella* involved statements that even the defendant conceded were false. The defendant argued that "all the government proved here was that [he] made false statements to the grand jury," and that falsity alone was insufficient for obstruction. *Id*. at 1081. The Second Circuit affirmed because in addition to proving falsity, the government showed that he concealed evidence by lying. *Id*. ("The obstruction count of the indictment did not charge Langella only with making false statements. It also accused him of concealing evidence . . . ."). *Langella* actually suggested that falsehood alone might be insufficient in that § 1503 requires falsehood plus more. It never suggested that falsity is not necessary.

4. *Griffin*

The government claims that in *United States v. Griffin*, 589 F.2d 200 (5th Cir. 1979), the Fifth Circuit held that truthful but evasive answers violate § 1503. That is false—*Griffin* involved false statements. As in *Langella*, the defendant argued that falsehood alone was insufficient. The Court described the question presented this way: "Is the effect of giving false testimony before a grand jury to prevent justice from being duly administered?" *Id*. at 203. The Court answered that question in the affirmative: "perjury constitutes an offense against the effective administration of justice." *Id*. It went on to hold that false denials of

knowledge can be just as obstructive as affirmative misstatements. *Id*. at 204. It never held or suggested that truthful statements can be obstructive.

5. *Browning*

The government claims that in *United States v. Browning*, 630 F.2d 694, 698-99 (10th Cir. 1980), the Tenth Circuit affirmed a § 1505 conviction based on truthful but incomplete and misleading testimony. That is false—like all the cases above, *Browning* involved false statements. As the Tenth Circuit stated: "Browning did not . . . tell the literal truth." *Id*. at 699. Browning was not convicted on the basis of true statements.

6. *Perkins*

The government claims that *United States v. Perkins*, 748 F.2d 1519, 1521-22 (11th Cir. 1984), the Eleventh Circuit affirmed an obstruction conviction based on evasive testimony. That is false—like *Griffin*, *Perkins* involved false denials of knowledge. Moreover, contrary to the government's assertion in its brief, the court in *Perkins* reversed the defendant's conviction. In the course of doing so, it also noted that the jury instructions describing the elements of obstruction had been incorrect, and it thus instructed the district court to give more complete and correct instructions at retrial. *Id*. at 1528. Thus, the government's suggestion that the Eleventh Circuit affirmed Perkins's conviction based on

truthful testimony is doubly wrong: the conviction was reversed, and it was not based on truthful testimony to begin with. Nothing in *Perkins* holds that truthful testimony can constitute an obstruction of justice.

Even taken together, the government's authorities are unpersuasive. Most are out-of-circuit cases. Many involve different provisions such as § 1505, which is broader than § 1503. Most importantly, none involve truthful testimony. The bottom line remains the same, and it merits repetition: Although the obstruction statute has existed for nearly two centuries, the government cannot point to a single case where a defendant has been found guilty of obstruction based on truthful testimony under oath.

F. Fair Warning

As the Supreme Court recently reiterated, a conviction "fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence notice of what is prohibited." *FCC v Fox Television Stations, Inc.* 132 S.Ct. 2307, 2317 (2012) (internal quotation marks omitted). The lack of any case law indicating that truthful grand jury testimony can violate § 1503 mandates reversal under the Due Process Clause. At the time of Mr. Bonds's testimony, he lacked fair warning that rambling about his childhood or his desire to discuss fishing with Mr. Anderson would subject him to

criminal penalties.

The government characterizes Mr. Bonds's Due Process challenges as an as-applied vagueness challenge. (GB at 35.) That characterization is too narrow. The fair warning requirement has several different doctrinal manifestations, of which the void-for-vagueness doctrine is only one. *See United States v. Lanier*, 520 U.S. 259, 266 (1997). On its face, the obstruction statute certainly suffers from vagueness problems, and the government's unconstrained interpretation would render the statute unconstitutionally vague as applied to this and other cases. But the more salient point here is that the Due Process Clause forbids common law crimes. Simply put, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id*.

Importantly, moreover, this Court has held that out-of-circuit cases generally cannot provide fair warning. *See Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004).[6] In attempting to demonstrate that the obstruction statute can

[6] *Boyd* was a civil qualified immunity case. As the Supreme Court has explained, the fair warning doctrine applies uniformly in both contexts. "[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Lanier*, 520 U.S. at 270-71.

reach truthful grand jury testimony, the government relies almost entirely on out-of-circuit authority. (GB at 44-47.) As Mr. Bonds has argued, those cases do not support the government's argument. But regardless, even if the government is correct about the law in the sister circuits, those cases cannot provide fair warning to a defendant *in this circuit*. Especially given that this Court has explicitly left open a question about the constitutionally permissible scope of § 1503, *see United States v. Aguilar*, 21 F.3d 1475, 1486 n.8 (9th Cir. 1994), ambiguous authority from other circuits cannot provide fair warning.

No decision of this Court or the Supreme Court has ever stated that § 1503 is so broad that it extends to truthful testimony. If this Court were to apply such a construction to the statute now, it could only do so prospectively. The fair warning forbids retroactive application of the government's proposed construction.

II. STATEMENT C WAS NOT MISLEADING, EVASIVE, OR MATERIAL

As a matter of law, § 1503 cannot be expanded to reach truthful statements to a grand jury. But even if this Court rejects that legal proposition—even if truthful statements are obstructive in some cases—Mr. Bonds's testimony in Statement C was not obstructive. Statement C was not misleading, it was not

evasive, and it was certainly not material.

In trying to defend the contrary position, the government is forced to rely almost entirely on testimony *other than* Statement C. Yet the government maintains that "[b]y 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." (GB at 55; *see also id*. at 23, 50). Given that the jury returned a conviction based on only one of those seven statements, the government's case has been "narrowed to," and thus must rise or fall on, that statement alone.

A. Misleading

First, the government argues that Statement C was misleading. (GB at 29-30.) But the government's real argument is not that Statement C was misleading, but rather that Mr. Bonds misled the jury "about Anderson's distribution of PEDs to him" because he "knew that Anderson was distributing PEDs to him." (*Id*.) This argument, however, is simply a reincarnation of the government's theory that Mr. Bonds lied in his other testimony—that in the charged false statement counts, on which the jury hung, Mr. Bonds lied and therefore misled the grand jury. The government fails to show that anything in Statement C itself could have misled the grand jury.

B. Evasive

Second, the government argues that in responding to the question of whether Anderson gave Mr. Bonds anything to self-inject, Statement C was evasive. (GB at 30-33.) But, as the government's brief concedes, "if a witness's answer fails to address the question asked . . . a prosecutor fairly bears the burden of pinning such a witness down." (GB at 33 (quoting *Bronston*.)) The government also agrees that "[i]mmediately after Bonds concluded his answer, the prosecutor essentially reiterated his question, asking if Anderson or Conte ever provided Bonds with an injectable liquid. Bonds answered no." (GB at 31 (citations omitted.)) The government suggests that Statement C might have delayed the proceedings (GB at 34), but any "delay" would be measured in mere seconds, a pause no longer than that involved in taking a sip of water or suffering a coughing spell before answering questions. No authority even vaguely suggests that such a trivial delay in the proceedings could constitute obstruction by evasion.

Again, the general point made by the government is not that Statement C somehow deceived the grand jury, but rather that Mr. Bonds generally deceived the grand jury because "he repeatedly denied that Anderson had given him injectables or injections." (GB at 32.) The government relies entirely on other

testimony[7] and evidence that was presented to prove the other charged counts. At bottom, the government's argument depends entirely on its accusation "that Bonds lied to the grand jury on the topic of injections." (GB at 32.) But the petit jury did not find Mr. Bonds guilty of that charge. The government cannot retry it on appeal.

C. Material

Third, the government argues that Statement C was material. (GB at 33-34.) Yet the government's remarkably thin one-page argument on materiality offers no explanation about how Mr. Bonds's rambling statement about being a celebrity child might have possibly impeded the function of the grand jury. What the brief does say muddies the law of materiality.

The government contends that "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," and that "materiality must be assessed by what Bonds sought to withhold from the grand jury." (GB at 33.) While it is true that § 1503 requires proof of a subjective intention to obstruct the grand jury, its threshold element is objective in nature. As the district court

[7] The government argues that Mr. Bonds was evasive and non-responsive when he said that only his personal doctor had touched him. (GB at 31.) That was not testimony within Statement C upon which he was found guilty.

instructed, the content of the charged statement itself must have had a "natural tendency to influence, or was capable of influencing, the decision of the grand jury." (ER 157.) The government says nothing about this objective requirement because there is nothing to be said. The brief delay in answering the question regarding self-injection was objectively immaterial. Indeed, as discussed at greater length below in Mr. Bonds's attack on the sufficiency of the indictment (*see* Argument III B), the government deliberately omitted the content of Statement C from Count Two, a clear recognition that the truthful "celebrity child" comments had nothing to do with the grand jury's inquiry.

The government concludes by repeating Agent Novitzky's trial testimony that Bonds's grand jury testimony could have impeded the proceedings in "many different ways." (GB at 34.) That is nothing more than *ipse dixit*. And critically, Novitzky never testified that anything about Statement C was material to the investigation. Rather, he testified that Bonds's statements about receiving PEDs were material. (*See* SER 209-11.) The government presented no evidence whatsoever that Statement C was material, and it cannot establish the materiality of Statement C by pointing to evidence that other questions and answers were material.

Materiality is a required element of the offense. As the instructions to the jury explained, the government was required to prove that Statement C itself was material. It is no answer to Mr. Bonds's arguments on appeal to say that Mr. Bonds other answers were false and misleading and evasive and material. It is no answer to say that Mr. Bonds testimony as a whole was false and misleading and evasive and material. Those were not the theories on which the jury found Mr. Bonds guilty. It found him guilty on the "narrowed" theory that Statement C was somehow evasive and also material.

The government on appeal is simply unable or unwilling to defend that theory. The government is therefore forced to shift to entirely different theories of guilt—theories that failed at trial, were abandoned at trial, or were never even mentioned at trial. That shift is ironic in part due to the government's heavy reliance on *Jackson v. Virginia* standard, for the government has apparently forgotten one of the critical lessons of *Jackson*: "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." 443 U.S. 307, 314 (1979).

Mr. Bonds was convicted on the theory that Statement C, though truthful, was evasive and material. His conviction cannot be upheld on any other basis, and thus cannot be upheld at all.

III. THE INDICTMENT WAS DEFICIENT

The government could have drafted an indictment that charged the offense ultimately submitted to the petit jury. Such an indictment would have described Statement C. It would have alleged that Mr. Bonds's testimony in Statement C constituted an obstruction of justice in violation of 18 U.S.C. § 1503. It would have alleged that Statement C was intentionally evasive, and that it was material—that is, that it had a natural tendency to influence the grand jury. It would have been accompanied by at least some description of facts and circumstances describing how Statement C mattered.

If the government had drafted such an indictment, the grand jury in this case would have had an opportunity to fulfill its constitutional function of ensuring that probable cause existed for the alleged offense. If it had made such a finding and returned the indictment, Mr. Bonds would have had an opportunity to challenge the legal theory underlying the Statement C count well in advance of trial. He also would have had an opportunity to prepare a defense based on the charge, by marshaling evidence and argument that Statement C was not misleading or evasive, and was certainly not material.

But the government did not draft such an indictment. As the government concedes, the indictment actually filed in this case did not even mention Statement

C, much less describe how the testimony in Statement C constituted a crime under § 1503. The government's brief cites no case in which approving a conviction in which a defendant sustaining a conviction of any kind, be it perjury or obstruction of justice, based on the giving of a statement that was not described with specificity in the charging document. Rather, the government attempts two arguments to avoid the consequences of its defective indictment.

A. Entire Testimony

First, the government argues that Mr. Bonds was not really convicted on the basis of Statement C, but rather was convicted on the basis of his entire testimony. Thus, it says that both the grand jury and the petit jury made the same finding of obstruction in toto: "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." (GB at 60.) Along the same lines, the government argues that Statement C was merely an "example" of obstructive testimony. (GB at 50, 55, 57, 59.) In short, on appeal the government returns to the argument that the entire grand jury testimony was obstructive, and Statement C was simply one piece.

That was not, however, the basis on which Mr. Bonds was convicted. Mr. Bonds was convicted on the theory that Statement C was obstructive—his

testimony in Statement C was the *actus reus* of the offense. The instructions given to the petit jury make this clear. The district court first told the jury that "a statement" had to be material. It then stated:

> The government alleges that the underlined portion of the following statements constitute material testimony that was intentionally evasive, false or misleading. In order for the defendant to be found guilty of Count 5, you must all agree that one or more of the following statements was material and intentionally evasive, false or misleading, with all of you unanimously agreeing as to which statement or statements so qualify:

(ER 157.) The petit jury's verdict was based not on the testimony as a whole, but rather on a particular piece of testimony: Statement C. Indeed, the government's "narrowing" argument, discussed further below, necessarily assumes that the government's case went to the jury not on the totality of Mr. Bonds' grand jury testimony, but only on "seven specified statements." (GB at 55.) The jury convicted on only one of those statements. The government's claim to the contrary misrepresents the record.

B. Narrowing

The government claims that any change between indictment and instructions at trial was only a "narrowing" of the indictment. That is not true. The truth is that the failure to include Statement C in the indictment's obstruction charge deprived

Mr. Bonds of the two constitutional protections provided by the Grand Jury Clause: notice in the indictment of the criminal conduct with which he is charged and against which he must defend; and the assurance that the grand jury has found probable cause to support the conduct alleged.

If the indictment had listed eight particular statements as the obstructive acts, and the petit jury had then been given only seven, that would have constituted an acceptable narrowing of the indictment. That did not happen here. Count Five of the third superceding indictment only referred to the statements listed in Counts One to Four as obstructive acts. The petit jury did not receive fewer statements through the district court's Count Five instructions; it received additional and different statements. The petit jury thus did not receive a narrower basis for conviction; it received different bases altogether.

This fact is demonstrated by examining the portion of the grand jury testimony charged as a false statement in Count Two and incorporated by reference into the Count Five obstruction charge. The underlined portion indicates the alleged falsehood.

> Question: Did Greg ever give you anything that required a syringe to inject yourself with?
>
> Answer: 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?
>
> **********
>
> Question: So no one else other than perhaps the team doctor and your personal physician has ever injected anything in to you or taken anything out?
>
> Answer: Well, there's other doctors from surgeries. I can answer that question, if you're getting technical like that. Sure, there are other people that have stuck needles in me and have drawn out - - I've had a bunch of surgeries, yes
>
> Question: So - -
>
> Answer: So sorry.
>
> Question: - - the team physician, when you've had surgery, and your own personal physician. But no other individuals like Mr. Anderson or any associates of his?
>
> Answer: No, no.

The asterisks in Count Two signify that a segment of Mr. Bonds's testimony has been omitted from the indictment, clearly indicating that the excised portion played no role in the grand jury's probable cause determination; the defendant thus was put on notice that the excised testimony would not be in issue at trial. *Yet the*

"celebrity child" portion of Mr. Bonds' grand jury testimony which served as the sole basis for his Count Five conviction was within the excerpt which the asterisks correctly indicated was excised from the indictment.[8]

The theory on which the petit jury convicted indisputably was not alleged in the indictment, thereby depriving Mr. Bonds of his constitutionally guaranteed rights to grand jury screening and to notice of the charges against him. The district court's instructions to the petit jury, which endorsed the government's new

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[8]

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.

theory of criminality, worked a constructive amendment.[9] For those reasons, even if the theory on which Mr. Bonds was convicted had been both legally valid and supported by sufficient evidence, the conviction must be reversed.

IV. THE JURY INSTRUCTIONS WERE FAULTY

Much of the government's brief on appeal is aimed at demonstrating that, regardless of whether Statement C itself was a crime, Mr. Bonds's entire testimony was a crime. It is therefore ironic that the government is forced to defend the position that Mr. Bonds was properly denied an instruction that his testimony should have been "considered in its totality." The government does not argue that the proposed instruction was legally incorrect. Rather, it argues that the instruction was unnecessary and confusing.

The government says that the totality instruction was unnecessary because the jury was duly instructed to consider "all the evidence." That is a non sequitur. Boilerplate instructions about considering all the evidence are no substitute for adequate instructions describing what findings are necessary for the substantive offense.

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[9] The government's claim that Mr. Bonds waived any claim to variance, (GB at 54 n.10), is legally nonsensical. As this Court has said, "'variance' and 'amendment' can, and often do, mean the same thing"— "a 'constructive amendment' is simply one kind of 'variance'." *United States v. Jingles*, 682 F.3d 811, 817, 818 (9th Cir. 2012).

The government also says that the defense's proposed instruction "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." (GB at 63.) That is nonsense. The instruction said nothing of the sort. The defense did not propose to require the government to prove that every single statement was a crime. It simply proposed to make the government establish that any particular statement was evasive or misleading in context rather than when read in isolation. That was the theory of liability which the government itself maintained was the factual basis for the obstruction charge. (Dkt. 203 [Gov't Opp. to Mtn. to Dismiss Indictment, at 7]: "factual basis" for obstruction count "consists of the totality of Bond's intentionally evasive, false and misleading conduct during her [sic] testimony.") The instruction thus would have been a correct statement of law, and there was no valid reason for the district court to refuse it. Reversal is required for this reason as well.

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CONCLUSION

Mr. Bonds's conviction on Count Five should be reversed, and the charge dismissed. Alternatively, the Court should order a new trial.

Dated: August 16, 2012

Respectfully Submitted,

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CERTIFICATION REGARDING BRIEF FORM

I, Donald M. Horgan, hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 6,953 words.

Dated: August 16, 2012

/s/ Donald M. Horgan
DONALD M. HORGAN

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