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

PETITION FOR REHEARING EN BANC

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STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

Pursuant to Federal Rule of Appellate Procedure 35(b), Barry Bonds hereby petitions for rehearing en banc of the panel decision in this matter. That published decision affirmed the defendant's conviction for obstruction of justice under 18 U.S.C. § 1503. *See United States v. Bonds*, - F.3d -, No. 11-10669 (9th Cir. Sept. 13, 2013) (Exhibit A). En banc review is necessary both to maintain uniformity of this Court's decisions and to resolve questions of exceptional importance.

INTRODUCTION

This is a case about prosecutors seeking a conviction of a high-profile defendant at any cost. The government charged Barry Bonds with lying to a grand jury that was investigating steroid use in professional sports. But the government's core case against Mr. Bonds crumbled because it could not prove that he lied. Years after it initially indicted Mr. Bonds, in order to salvage some victory from this long and expensive prosecution, the government invented a fallback theory of liability. That theory was that Mr. Bonds committed obstruction of justice when, rather than responding directly to a question he'd been asked by the prosecutor, he rambled on about being a "celebrity child." The "celebrity child" statement was not alleged anywhere in the indictment; indeed, the government itself had used ellipses to redact the rambling statement from the indictment. The government also conceded at trial that the statement was literally true.

The trial jury did not find Mr. Bonds guilty of lying. It found him guilty

solely on the fallback theory that the "celebrity child" statement, while truthful, was evasive. A three-judge panel of this Court affirmed.

In so doing, the panel refused to enforce all of the usual requirements that apply to perjury and false statement cases. Perjury cases are governed by long-established Supreme Court precedent, which holds that: (1) the false statement must be specifically identified in the indictment; (2) the statement must be literally false; (3) a statement that is merely evasive or implicitly misleading is insufficient; (4) if a witness initially fails to answer, the questioner must attempt to pin the witness down; and (5) the witness must be given an opportunity to cure initially false statements. The panel in this case held, for the first time, that none of those principles apply to obstruction prosecutions.

The law of this Circuit is divided on whether the obstruction statute covers perjury. Those cases adopting the "perjury-as-obstruction" theory were wrong, but they did little harm. Their main effect was to allow prosecutors to double-charge witness lies as both perjury and obstruction. (In fact, that is what prosecutors did in this case: they double-charged Mr. Bonds's allegedly false statements as both perjury under 18 U.S.C. § 1623 and obstruction under 18 U.S.C. § 1503.) But while it is one thing to say that perjury constitutes obstruction, it is quite another to say that non-perjury under oath constitutes obstruction.

The panel in this case became the first federal court to hold that non-perjury under oath constitutes obstruction. The panel's holding means that witnesses now have an affirmative duty to turn over all relevant information in their possession.

The panel's holding also means that any trial or grand jury witness can be subject to criminal prosecution if she is insufficiently cooperative, even for a moment. The scope of potential liability is vast.

After this ruling, obstruction will function as a way to obtain back-door convictions against witnesses viewed with disfavor by the government even when actual lies on their part cannot be proven. The limitations formerly applicable to perjury prosecutions will no longer have any meaning, since prosecutors can always charge the same witnesses with obstruction instead.

As one constitutional law professor and former federal prosecutor said of the panel opinion: "I'm surprised because the opinion in some sense doesn't do justice to the complexity of the arguments."[1] The arguments are indeed complex, and the implications are far-reaching. They merit more careful consideration by an en banc panel of this Court.

STATEMENT OF THE CASE

A. Background

The criminal charges in this case arose out of Mr. Bonds's testimony before a grand jury in 2003. The government had convened the grand jury to investigate Balco Laboratories, a Bay Area company suspected of distributing performance-enhancing drugs to professional athletes. Mr. Bonds was subpoenaed to testify before the Balco grand jury.

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[1] Howard Mintz, *Home Run King Barry Bonds Obstruction Conviction Upheld*, San Jose Mercury News (Sept. 13, 2013) (quoting Rory Little).

In his testimony, Mr. Bonds admitted that he had a relationship with Balco. He testified that he had obtained various substances, including those known as "the cream" and "the clear," from Balco through personal trainer Greg Anderson. Mr. Bonds testified that he believed the substances were legal. He denied that he had knowingly taken illegal performance-enhancing drugs provided by Balco.

B. Charges

In 2007, the government indicted Mr. Bonds for several counts of perjury and obstruction of justice arising out of his grand jury testimony.[2] The final superseding indictment consisted of five counts: four counts of false declarations to a grand jury in violation of 18 U.S.C. § 1623(a), and one count of obstruction of justice in violation of 18 U.S.C. § 1503. (ER 190-98.)

The four false declarations counts were based on Mr. Bonds's testimony: (1) that he never knowingly took steroids provided by Anderson, (2) that Anderson never injected him with anything, (3) that Anderson never gave him human growth hormone, and (4) that prior to the 2003 baseball season, Anderson never gave him anything other than vitamins. The government had eliminated Mr. Bonds's statement about being a celebrity child from the indictment and had replaced it with ellipses. The obstruction count, as alleged in the indictment, did not specify any particular statements other than the same four charged in the false declarations counts. The indictment stated that Mr. Bonds obstructed justice by giving

[2] Prior to trial, the government unsuccessfully pursued an interlocutory appeal to this Court based on the district court's exclusion of hearsay evidence. *See United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010).

testimony that was "intentionally evasive, false, and misleading, including but not limited to the false statements made by the defendant as charged in Counts One through Four of this Indictment." (ER 198.)

C. Trial and Conviction on Statement C

Ultimately, the jury was unable to reach a unanimous verdict as to any of the false declarations charges. The jury did, however, reach a guilty verdict on the obstruction count. The jury's special verdict form indicated that its guilty verdict was based solely on "Statement C," also known as the "celebrity child" testimony. (ER 40.)

Statement C, submitted to the trial jury over the defense's objection (Dkt. 194; ER 45-49; ER 162-63), consists of the underlined portion of the following testimony by Mr. Bonds before the Balco grand jury:

> 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. <u>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</u>. So, I don't know -- I don't know -- I've been married to a woman five years, known

> her 17 years, and I don't even know what's in her purse. I have never looked in it in my lifetime. You know, I just -- I don't do that, I just don't do it, and you know, learned from my father and throughout his career, you don't get in no one's business, you can't -- there's nothing they can say, you can't say nothing about them. Just leave it alone. You want to keep your friendship, keep your friendship.

(ER 301-02.)

Less than a minute later, prosecutors again asked Mr. Bonds whether he had injected himself with anything, or whether Mr. Anderson had ever provided him with injectable steroids. Mr. Bonds answered in the negative. (ER 302.) The question was repeated, and he answered in the negative each time. (ER 303, 306, 308.) The prosecutor admitted that "we've covered this, but"—and again repeated the question. Mr. Bonds again answered that Mr. Anderson had never given him injectable substances. (ER 306.)

The prosecution argued to the trial jury that Mr. Bonds's testimony in Statement C was obstructive because, although literally truthful, it was evasive and failed to respond to the question that had been asked. The trial jury convicted Mr. Bonds of obstruction solely on this basis.

D. Appeal

Mr. Bonds appealed the obstruction conviction. He argued, *inter alia*, (1) that the obstruction statute, 18 U.S.C. § 1503, does not cover grand jury testimony at all; (2) that if false grand jury testimony is covered, the statute should not be further extended to cover truthful testimony; and (3) that the indictment was deficient because Statement C was not mentioned in, and indeed had been

redacted from, the charged testimony.

On September 13, 2013, a three-judge panel of this Court affirmed the conviction. The panel held that Mr. Bonds's argument against applying § 1503 was "foreclosed by established precedent." Slip op. at 15. It held that the statute covers any conduct "intended to deprive the factfinder of relevant information." Slip op. at 10. It thus concluded that § 1503 could be properly extended "to factually true statements that are evasive or misleading" such as Statement C. Slip op. at 11. The panel further held that, although Mr. Bonds "eventually" answered the same question directly, this was "irrelevant." Mr. Bonds was guilty at the moment he gave the non-responsive answer in Statement C. Slip op. at 13.

REASONS FOR GRANTING EN BANC REVIEW

I. THE PANEL'S BROAD CONSTRUCTION OF THE OBSTRUCTION STATUTE RENDERS MEANINGLESS ALL PRIOR LIMITATIONS ON CRIMINAL LIABILITY FOR WITNESSES

Trial and grand jury witnesses may be convicted of perjury or false statement crimes if they lie under oath. Some decisions of this Court have held that lies under oath also constitute obstruction of justice. But either path of conviction has been subject to several limitations—among them, a specific false statement must be charged in the indictment; the charged testimony must be proven literally false; and a witness may cure a false answer by correcting it. In this case, for the first time, the three-judge panel held that those requirements no longer apply to obstruction prosecutions. The ruling radically alters the legal principles governing criminal liability for witness misconduct.

A. The Panel's Opinion Ignores Unsettled Circuit Law

The panel's decision was based on a body of prior case law holding that the obstruction statute, 18 U.S.C. § 1503, also encompasses perjury. Mr. Bonds argued that even if that is true, the limitations of perjury must also apply to obstruction. But preliminarily, Mr. Bonds argues that, properly interpreted, § 1503 does not cover perjury because it does not cover witness testimony at all. The panel summarily dismissed this argument, stating that it is "foreclosed by established precedent."

To the contrary, the case law in this circuit is conflicting. Admittedly, several prior decisions of this Court have endorsed the "perjury-as-obstruction" theory. *See United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir. 1984); *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1984). But for decades prior to those rulings, this Court interpreted § 1503 narrowly, consistent with its intended scope. *See United States v. Metcalf*, 435 F.2d 754, 757 (9th Cir. 1970); *Haili v. United States*, 260 F.2d 744, 745-46 (9th Cir. 1958). In *Rasheed*, this Court suddenly reversed course and wrote off prior precedent as "dicta." 663 F.2d at 851-52. Two decades ago, an en banc panel recognized the conflict, and also the serious constitutional issues raised by the expansive interpretation of § 1503, but declined to settle the issue. *United States v. Aguilar*, 21 F.3d 1475, 1486 n.8 (9th Cir. 1994).[3]

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[3] The Supreme Court reversed in part on other grounds. *United States v. Aguilar*, 515 U.S. 593 (1995). The majority of the Court likewise declined to reach the broader question regarding the statute's scope. *Id*. at 600 & n.1.

Those prior cases holding that lies under oath constitute obstruction as well as perjury were wrongly decided. *First*, they are inconsistent with the text of §1503, which does not mention witness testimony at all. *Second*, they are inconsistent with § 1515(b), a related provision in which Congress stated that false statements constitute obstruction for other statutes but not § 1503. *Third*, by expansively interpreting the omnibus clause of § 1503, they are inconsistent with the *ejusdem generis* canon of statutory interpretation, which holds that catch-all clauses in criminal statutes must be construed narrowly to cover only acts similar to those already listed. *See Begay v. United States*, 553 U.S. 137, 143 (2008). *Fourth*, they are inconsistent with the legislative history. As Mr. Bonds detailed in his brief, every court and legal historian to examine § 1503 has concluded that the statute was not intended to cover false testimony.[4] *Fifth*, by giving § 1503 a "comprehensive" reading to facilitate prosecution, they are inconsistent with the rule of lenity. *See United States v. Santos*, 553 U.S. 507, 519 (2008) (Scalia, J.).

But until now, this debate was largely academic. *Rasheed* and *Gonzalez-Mares* held that § 1503 covers false statements under oath. The main effect of these holdings was to allow prosecutors to double-charge perjury cases under § 1503. *See, e.g., United States v. Thomas*, 612 F.3d 1107, 1125-27 (9th

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[4] *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); Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States—Since the Federal Contempt Statute*, 28 Colum. L. Rev. 525, 531 (1928); *see also Nye v. United States*, 313 U.S. 33, 45 (1941) (noting that the statute was enacted to *limit* obstruction prosecutions).

Cir. 2010). Because the standards were the same, and the penalties similar, it hardly mattered. If a jury found that a defendant was guilty of perjury, it would also find false-statement obstruction; if not guilty of one, not guilty of either. Until now, there was little reason for this Court to revisit the holdings in *Rasheed* and *Gonzalez-Mares* because those cases were wrong but meaningless. Until now, there was no reason to settle the intra-circuit split between those cases and the *Haili-Metcalf* line. The debate didn't matter, because its resolution didn't affect the outcome or sentence in any real cases.

That has all changed. After the panel's holding in this case, obstruction is not simply a way to double-charge perjury. Now, obstruction is a back-door way to punish disfavored witnesses without having to prove any actual perjury.

B. The Panel's Ruling Eliminates Requirements Ordinarily Applicable to Perjury and False Statement Cases

Some prior cases have held that perjury can be sufficient for obstruction. The panel in this case held, for the first time, that perjury is not necessary for obstruction. It held that truthful witness testimony under oath could constitute obstruction. It held that the mere intent to withhold relevant evidence is obstruction.

The panel decision suggests that all witnesses (and indeed all citizens) have an *affirmative duty* to turn over all relevant evidence, and that failure to do so constitutes a crime. The implications of this ruling are immense, and they deserve more careful consideration. The panel did not seem aware of the sweep of its ruling.

1. The Panel's Logic

Mr. Bonds argued that truthful statements cannot constitute obstruction. The panel disagreed. It first noted that the text of the obstruction statute "does not differentiate between" true statements and false statements made by witnesses. Slip op. at 10. But that assertion is true *only* because the statute does not refer to witness statements *at all*. The reasoning is circular and Orwellian in its consequences. Under the panel's logic, a penal statute can be read to criminalize both what it expressly proscribes and what it fails to even mention.

The panel further reasoned that truthful statements can be obstructive because the key to liability is not the nature of the conduct but rather the defendant's intent. The panel held that the statute criminalizes any "conduct intended to deprive the factfinder of relevant information." Slip op. at 10.[5] That is the critical move in the panel's argument—and it is a stunningly broad statement of criminal liability. The panel held that the gravamen of the offense is not a false statement or any actually obstructive conduct but rather the mere intent to deprive the factfinder of relevant information. By that logic, a witness who thinks to herself "I will not reveal this embarrassing episode unless asked on the stand" has committed a federal offense at the moment she has the forbidden thought.

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[5] For this proposition, the panel cited a Seventh Circuit case, *United States v. Ashqar*, 582 F.3d 819, 822-23 (2009). But *Ashqar* dealt with the proper wording of the jury instruction defining "corruptly." Nothing in *Ashqar* suggests that the bare intent to deprive a factfinder of relevant information constitutes a crime.

Compounding matters, the panel also held that the evidentiary burden needed to prove the forbidden intent beyond a reasonable doubt is not great. On the face of Mr. Bonds's testimony, it is hard to see how rambling about being a "celebrity child" demonstrates an intent to withhold evidence. According to the panel, the testimony was illegal and obstructive because "it implied that Bonds did not know whether Anderson distributed steroids and PEDs." Slip op. at 12. That is, to put it mildly, an aggressive interpretation of Mr. Bonds's intended meaning when he rambled about being a celebrity child. It is also a theory of liability that was never argued by the prosecutor or otherwise presented to the jury, nor can it be found in the government's appellate briefing.

Finally, the panel decision not only held that truthful statements can be obstructive; it held that this was an incurable offense. The panel held that it was "irrelevant that Bonds eventually provided a direct response" to the same question he purportedly evaded. Slip op. at 13. This is true because, according to the panel, a witness is immediately and irretrievably guilty the moment she posseses the forbidden intent to deprive the factfinder of relevant information. According to the panel, no subsequent conduct can cure a momentary lapse of cooperation. By this standard, because at some point nearly all witnesses give at least one unresponsive answer, nearly all witnesses will be guilty of obstruction.

Prior to this case, a witness who committed perjury also committed obstruction. After this case, a witness who is insufficiently cooperative, even for a moment, is guilty of obstruction. Rambling, stammering, and faltering under oath

is now a federal offense.

2. Obstruction, Perjury, and Bronston

Dubious logic aside, perhaps the biggest vice of the panel's ruling is that it obliterates all of the limitations that have always applied to perjury and false statement prosecutions. The seminal case dealing with a witness's criminal liability for conduct under oath is *United States v. Bronston*, 409 U.S. 352 (1973). Remarkably, the panel never cited *Bronston*, though the implications of *Bronston* were briefed by the parties. Nearly every aspect of the panel's ruling squarely conflicts with *Bronston*.

a. Literal truth

In *Bronston*, the Supreme Court held that literal truth is a defense to perjury charges. A charge may not be brought "simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth." *Id*. at 360. In this case, however, the panel held that truth is no defense. "We can easily think of examples of responses that are true but nevertheless obstructive." Slip op. at 10.

b. Unresponsive answers

In *Bronston*, the Supreme Court held that nonresponsive answers under oath do not constitute a crime. Although the Court accepted as "[b]eyond question" the government's claim that the defendant's answer was "not responsive," *id*. at 357, it held that such an answer is not criminal. The Court explained why: "Under the pressures and tensions of interrogation, it is not uncommon for the most earnest

witnesses to give answers that are not entirely responsive." *Id*. at 358. In this case, however, the panel held that non-responsive answers that can "be deemed evasive" are criminal. Slip op. at 10.

c. Implicitly false answers

In *Bronston*, the Supreme Court held that a witness cannot be held liable for answers that are merely *implicitly* misleading. The Court held that "the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true." *Id*. at 357-58. It held, in other words, that answers that are "unresponsive on their face but untrue only by 'negative implication'" are not criminal. *Id*. at 361. In this case, however, the court held that Mr. Bonds's testimony was criminal "because it implied that Bonds did not know whether Anderson distributed steroids and PEDs." Slip op. at 12.

d. Questioner's burden

In *Bronston*, the Supreme Court held that when a witness gives an answer that is initially nonresponsive, the "burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id*. at 360. It reasoned that in our system of adversary questioning, "the scope of disclosure is largely in the hands of counsel . . . ." *Id*. at 358 n.4. In this case, however, the panel held that the prosecutor's subsequent repetition of the key question, and Mr. Bonds's subsequent answers, were "irrelevant." It held that Mr. Bonds was guilty at the moment he gave an initial unresponsive answer. Slip op. at 13. Under the panel's

ruling, the burden is on the witness.

e. Broad construction

In *Bronston*, the Supreme Court rejected the government's argument that the "statute be construed broadly" in order to "fulfill its historic purpose of reinforcing our adversary factfinding process." *Id*. at 358. In this case, however, the panel accepted the government's argument that the statute should be given a "broad" and "comprehensive" interpretation in order to protect the "due administration of justice." Slip op. at 10, 14.

The panel's rationale conflicts with *Bronston* in every material respect. In the panel's defense, it is true as a formal matter that *Bronston* dealt with the perjury statute while this case involves the obstruction statute. But it is hard to see why the same principles should not apply in both contexts. Indeed, in the wake of this opinion, it is hard to see what function the perjury statute serves, since a federal prosecutor can always charge obstruction instead, thereby avoiding the limitations imposed by *Bronston*, and potentially obtaining a more stringent penalty to boot.[6] The panel's opinion renders the perjury statute meaningless, and it makes *Bronston* a dead letter. The obstruction statute now engulfs them both.

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[6] Although the recommended Guidelines sentences are generally the same, the statutory maximum for obstruction is double that for perjury. *See* 18 U.S.C. §§ 1503(b)(3), 1621-23. That fact has new salience in the wake of *United States v. Booker*, 543 U.S. 220 (2005).

II. THE PANEL'S HOLDING THAT A DEFENDANT CAN BE CONVICTED OF OBSTRUCTION BASED ON TESTIMONY NOT CHARGED IN THE INDICTMENT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, OTHER CIRCUITS, AND THE SUPREME COURT

Even if there were no other issue worthy of en banc consideration raised by the panel's opinion, such review would be required to address the panel's elimination of the requirements of pleading ordinarily applicable in perjury and false statement cases. It has always been the law that an indictment in a false statement case must specifically identify the statement alleged to be false. In this case, Statement C was intentionally redacted from the indictment. The panel found the pleading sufficient anyway.

During his appearance before the grand jury, Mr. Bonds was asked and answered over 500 questions. A dozen of those answers were specifically alleged in the four false statement counts contained in the indictment; those dozen exchanges were in turn incorporated by reference in the Count Five obstruction charge. The "celebrity child" question and answer were not alleged anywhere in the indictment. Indeed, the government intentionally excised the "celebrity child" statement from the false statements alleged in Count Two (and thus from the Count Five obstruction charge). The statement of conviction was replaced in Count Two by asterisks, clearly indicating that the excised language played no role in the grand jury's probable cause determination.

In general, a defendant has a constitutional right "to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361

U.S. 212, 217 (1960). "A person is entitled under the Fifth Amendment not to be held to answer for a felony except on the *basis of facts* which satisfied a grand jury that he should be charged." *United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9th Cir. 1997) (emphasis added). In the context of criminal charges against witnesses, this has always meant that an indictment must specify the specific piece of criminal testimony. In its seminal decision in *Russell v. United States*, 369 U.S. 749, 753 (1962), the Supreme Court dismissed an indictment where it failed to specify which piece of testimony constituted a crime. Since *Russell*, courts in all manner of perjury and false statements cases have ruled that the indictment must specify what statement was false. *See, e.g., United States v. Tonelli*, 577 F.2d 194, 200 (3d Cir. 1978) (perjury indictment dismissed because "the indictment in this case did not set forth the precise falsehoods alleged").

In this case, however, the panel ruled that the indictment was sufficient even though it failed to mention Statement C. The panel reasoned that, in alleging that the obstruction charge included but was "not limited to the false statements made by the defendant as charged in Counts One through Four," the indictment " put Bonds on notice" that he could be convicted based on any statement made during his grand jury testimony. Slip op. at 17-18. Under that logic, an indictment alleging that a defendant committed obstruction during testimony lasting over a week and ranging over many subjects would be constitutionally sufficient, although the defendant would be left to guess as to which of thousands of statements in his testimony needed to be defended as truthful. The panel cited no

case law to support its holding for good reason; all federal case law is directly to the contrary.

CONCLUSION

Unpleased with the performance of a witness, federal prosecutors no longer have to deal with the annoying legal requirements constraining perjury convictions found in *Bronston*, *Russell*, and other cases. Now, they can dispense with all of that simply by charging obstruction and citing *Bonds*.

The result in this case is a boon for federal prosecutors, who now have broad new power to punish witnesses whom they view as insufficiently cooperative. Whether the result sensibly interprets the federal criminal code, however, is another matter—and it is a matter that deserves en banc review.

Dated: October 28, 2013

Respectfully Submitted,

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CERTIFICATION REGARDING BRIEF FORM

I, Dennis P. Riordan, hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 4,641 words.

Dated: October 28, 2013

/s/ Dennis P. Riordan
Dennis P. Riordan

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Signature: _____
Jocilene Yue

EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. BARRY LAMAR BONDS, *Defendant-Appellant*.	No. 11-10669 D.C. No. 3:07-cr-00732-SI-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted
February 13, 2013—San Francisco, California

Filed September 13, 2013

Before: Mary M. Schroeder, Michael Daly Hawkins,
and Mary H. Murguia, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY*

Criminal Law

The panel affirmed Barry Bonds's conviction of one count of obstruction of justice, in violation of 18 U.S.C. § 1503, arising from Bonds's testimony before a grand jury investigating whether the proceeds of the sales of performance enhancing drugs were being laundered.

The panel held that § 1503 applies to factually true statements that are evasive or misleading.

The panel held that there was sufficient evidence to convict Bonds because his statement describing his life as a celebrity child – in response to a question asking whether his trainer ever gave him any self-injectable substances – was evasive, misleading, and capable of influencing the grand jury to minimize the trainer's role in the distribution of performance enhancing drugs.

The panel rejected as foreclosed by precedent Bonds's contention that § 1503 does not apply to a witness's statements before a grand jury.

The panel rejected Bonds's contentions that the use of the word "corruptly" in § 1503 is unconstitutionally vague.

The panel held that the indictment – which covered any false, misleading, or evasive statement Bonds made during

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

his grand jury testimony – was sufficient, and that narrowing the indictment via jury instructions listing the specific statements for which Bonds could be convicted – was permissible.

The panel concluded that the district court properly rejected Bonds's request to add the words "when considered in its totality" to the jury instructions.

COUNSEL

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Melinda Haag, United States Attorney, Barbara J. Valliere, Assistant United States Attorney, Merry Jean Chan (argued), Assistant United States Attorney, San Francisco, California, for Plaintiff-Appellee.

OPINION

SCHROEDER, Circuit Judge:

Barry Bonds was a celebrity child who grew up in baseball locker rooms as he watched his father Bobby Bonds and his godfather, the legendary Willie Mays, compete in the Major Leagues. Barry Bonds was a phenomenal baseball player in his own right. Early in his career he won MVP awards and played in multiple All-Star games. Toward the end of his career, playing for the San Francisco Giants, his

appearance showed strong indications of the use of steroids, some of which could have been administered by his trainer, Greg Anderson. Bonds's weight and hat size increased, along with the batting power that transformed him into one of the most feared hitters ever to play the game. From the late-1990s through the early-2000s, steroid use in baseball fueled an unprecedented explosion in offense, leading some commentators to refer to the period as the "Steroid Era."[1] In 2002, the federal government, through the Criminal Investigation Division of the Internal Revenue Service, began investigating the distribution of steroids and other performance enhancing drugs ("PEDs"). The government's purported objective was to investigate whether the distributors of PEDs laundered the proceeds gained by selling those drugs.

The government's investigation focused on the distribution of steroids by the Bay Area Laboratory Co-operative ("BALCO"), which was located in the San Francisco Bay Area. The government raided BALCO and obtained evidence suggesting that Anderson distributed BALCO manufactured steroids to Bonds and other professional athletes. The government convened a grand jury in the fall of 2003 to further investigate the sale of these drugs in order to determine whether the proceeds of the sales were being laundered. Bonds and other professional athletes were called to testify. Bonds testified under a grant of immunity and denied knowingly using steroids or any other PEDs provided by BALCO or Anderson. The government

[1] *See* Buster Olney, *Steroid Allegations Overshadow Achievements*, http://sports.espn.go.com/mlb/columns/story?columnist=olney_buster&id=2011727 (last visited July 22, 2013) ("[H]istory is destined to recall th[e] period [from 1988 to 2004] as baseball's Steroid Era.").

later charged Bonds with obstructing the grand jury's investigation. After a jury trial, Bonds was convicted of one count of obstruction of justice in violation of 18 U.S.C. § 1503. He now appeals. We affirm the conviction.

BACKGROUND

Our earlier opinion provides the background of the government's investigation into BALCO and Bonds. *See United States v. Bonds*, 608 F.3d 495, 498–99 (9th Cir. 2010). Because Bonds's grand jury testimony is central to this appeal and was not at issue in the earlier opinion, we below briefly describe his grand jury testimony and the resulting criminal trial.

On December 4, 2003, Bonds testified before the grand jury under a grant of immunity pursuant to 18 U.S.C. § 6002. The immunity order stated that "the testimony and other information compelled from BARRY BONDS pursuant to this order . . . may not be used against him in any criminal case, except a case for perjury, false declaration, or otherwise failing to comply with this order." Before Bonds testified, the government informed him that the purpose of the grand jury was to investigate any illegal activities, including the distribution of illegal substances, that Anderson and Victor Conte (the founder of BALCO) engaged in. The government also explained the scope of the immunity grant under which Bonds would testify.

Bonds testified before the grand jury that Anderson never offered him, supplied him with, or administered to him any human growth hormone, steroids, or any substance that required injection. A portion of Bonds's testimony, referred to as "Statement C," formed the basis for the later criminal

charge of obstruction of justice. It is the underlined portion of the following grand jury excerpt:

> 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: Right.
>
> Answer: *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.*

Shortly after that exchange, the government returned to the subject of drugs and asked whether Anderson provided Bonds any drugs that required self-injection. Bonds answered with a somewhat indirect denial:

> Question: And, again, I guess we've covered this, but – did [Anderson] ever give you anything that he told you had to be taken with a needle or syringe?
>
> Answer: Greg wouldn't do that. He knows I'm against that stuff. So, he would never come up to me – he would never jeopardize our friendship like that.
>
> Question: Okay. So, just so I'm clear, the answer is no to that, he never gave you anything like that?
>
> Answer: Right.

Bonds was later indicted on the basis of his grand jury testimony. The third superseding indictment charged him with four counts of making false statements before a grand jury in violation of 18 U.S.C. § 1623(a), and one count of obstruction of justice in violation of 18 U.S.C. § 1503. With respect to the obstruction of justice charge, the indictment read as follows:

> On or about December 4, 2003, in the Northern District of California, the defendant, Barry Lamar 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 made by the defendant as charged

> in Counts One through Four of this Indictment. All in violation of Title 18, United States Code, Section 1503.

Bonds's criminal trial began on March 22, 2011, but was interrupted when the government appealed an adverse evidentiary ruling. The district court had excluded on hearsay grounds evidence the government contended linked Bonds to steroid use. We affirmed the district court's decision to exclude the evidence. *Bonds*, 608 F.3d at 508. The trial then continued.

At the close of its case-in-chief, the government dismissed one of the false statement charges. On April 13, 2011, the trial jury returned its verdict. The jury convicted Bonds of the obstruction of justice charge, finding on the verdict form that Statement C was misleading or evasive. It was unable to reach a verdict on the remaining three false statement counts. The district court sentenced Bonds to 30 days home confinement and two years probation.

Bonds now appeals the judgment of conviction. He asserts five principal challenges. First, he asserts that the obstruction of justice statute, 18 U.S.C. § 1503, does not apply to statements that are misleading or evasive, but nevertheless factually true, and even if § 1503 does apply, there was insufficient evidence to support his conviction. Second, he claims that § 1503 does not cover a witness's testimony to a grand jury. Third, he contends that the use of the word "corruptly" in § 1503 is unconstitutionally vague. Fourth, he maintains that the indictment did not provide him with sufficient notice of the obstruction of justice charge. Fifth and finally, he argues that the trial court should have

granted his request to modify the jury instructions. We affirm the conviction.

DISCUSSION

I.

Bonds claims that he could not have been convicted of obstructing the grand jury's investigation with an answer that was misleading or evasive, no matter how far removed that answer was from the question asked, unless the answer was false. According to Bonds, because his response in Statement C that he was a "celebrity child" was factually true, his conviction should be reversed. The problem is that while Bonds was a celebrity child, that fact was unrelated to the question, which asked whether Anderson provided Bonds with any self-injectable substances. When factually true statements are misleading or evasive, they can prevent the grand jury from obtaining truthful and responsive answers. They may therefore obstruct and impede the administration of justice within the meaning of the federal criminal statute, 18 U.S.C. § 1503, a statute that sweeps broadly.

The obstruction of justice statute provides in relevant part:

> Whoever . . . 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).

18 U.S.C. § 1503(a).

That portion of the statute, known as the omnibus clause, is comprehensive. We have described it as being "designed to proscribe all manner of corrupt methods of obstructing justice." *United States v. Rasheed*, 663 F.2d 843, 851–52 (9th Cir. 1981). The essence of the statute is that it criminalizes conduct intended to deprive the factfinder of relevant information. *See United States v. Ashqar*, 582 F.3d 819, 822–23 (7th Cir. 2009); *see also United States v. Brady*, 168 F.3d 574, 577–78 (1st Cir. 1999) ("It is settled . . . that 'the due administration of justice' includes the operation of the grand jury, and that depriving the grand jury of information may constitute obstruction under [18 U.S.C. § 1503]"). The language of the statute does not differentiate between obstructive statements that are false, and obstructive statements that are not false. It requires only that the defendant make his statement with the intent to obstruct justice.

We can easily think of examples of responses that are true but nevertheless obstructive. Consider a situation where a prosecutor asks a grand jury witness if the witness drove the getaway car in a robbery. The witness truthfully responds, "I do not have a driver's license." This response would be factually true, but it could also imply that he did not drive the getaway car. If the witness did in fact drive the getaway car, his answer, although not in itself false, would nevertheless be misleading, because it would imply that he did not drive the getaway car. It could also be deemed evasive since it did not answer the question.

The cases interpreting § 1503 support our conclusion that misleading or evasive testimony that is factually true can obstruct justice. Several courts have noted the material similarity between evasive or misleading testimony and false

testimony. In *United States v. Griffin*, the Fifth Circuit observed that there was no material difference between an evasive answer that deliberately conceals information and a false answer, because both block the flow of truthful information. 589 F.2d 200, 204 (5th Cir. 1979). The Eleventh Circuit in *United States v. Perkins* grouped evasive and false statements together when it stated that "a reasonable jury could have found that [the defendant's] answers were evasive or false in an effort to obstruct the grand jury's investigation." 748 F.2d 1519, 1527–28 (11th Cir. 1984). The Second Circuit quoted with approval the district court in *United States v. Gambino (Thomas)*, No. 89-CR-431 (E.D.N.Y.), in which Judge Jack Weinstein said that "literally true but evasive and misleading testimony would support prosecution of [the defendant] for obstruction of justice." *United States v. Remini*, 967 F.2d 754, 755 (2d Cir. 1992). Accordingly, we hold that § 1503 applies to factually true statements that are evasive or misleading. Bonds cannot escape criminal liability under § 1503 by contending that his response that he was a "celebrity child" was true.

Bonds next asserts that even if the obstruction of justice statute can apply to factually true statements, the evidence at trial did not establish that Statement C was evasive, misleading, or material. We must view the evidence in the light most favorable to the prosecution, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and we conclude that there was sufficient evidence to convict Bonds of obstructing justice.

The jury instructions provided that the government had to prove that Bonds, "(1) for the purpose of obstructing justice, (2) obstructed, influenced, or impeded, or endeavored to obstruct, influence, or impede the grand jury proceeding in which [he] testified, (3) by knowingly giving material

testimony that was intentionally evasive, false, or misleading." Bonds does not challenge the instructions as to these elements.

Bonds made Statement C in response to a question that asked whether Greg Anderson ever gave Bonds any self-injectable substances. Bonds responded that he and Anderson did not discuss each other's "business." Bonds stated:

> 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.

Bonds's description of his life as a celebrity child had nothing to do with the question, which asked whether Anderson provided him with self-injectable substances. The statement served to divert the grand jury's attention away from the relevant inquiry of the investigation, which was Anderson and BALCO's distribution of steroids and PEDs. The statement was therefore evasive.

The statement was also at the very least misleading, because it implied that Bonds did not know whether Anderson distributed steroids and PEDs. Yet, the jury at trial heard testimony from the Giants former team athletic trainer who testified about a conversation he had with Bonds before Bonds's grand jury testimony. According to the trainer, Bonds stated in this conversation that he knew that Anderson distributed steroids. Bonds also told the trainer about techniques Anderson used to conceal the identities of players

taking steroids. This evidence at trial showed that Bonds's statement to the grand jury was misleading. It is irrelevant that Bonds eventually provided a direct response to the question about self-injectable substances. Section 1503 punishes any "endeavor" to obstruct. Obstruction occurred when Bonds made Statement C.

With respect to materiality, we have said that a statement is material so long as it had "a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003) (internal quotation marks omitted). The question asking whether Anderson provided Bonds with injectable substances was well within the scope of the grand jury's investigation, since many steroids and PEDs are injectable. Bonds's evasive and misleading "celebrity child" response was capable of influencing the grand jury to minimize Anderson's role in the distribution of illegal steroids and PEDs. The statement was material.

II.

Bonds next asks us to hold that even if § 1503 applies to evasive or misleading statements that are factually true, the statute does not apply to statements a witness makes to the grand jury. Established Ninth Circuit and Supreme Court precedent, however, holds that § 1503 does apply to a witness's testimony before the grand jury. The omnibus clause of the statute is just that. It "proscribe[s] all manner of corrupt methods of obstructing justice." *Rasheed*, 663 F.2d at 852; *see also United States v. Aguilar*, 515 U.S. 593, 598 (1995) (noting that the "'[o]mnibus [c]lause' serves as a

catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice").

Consistent with the broad scope of the omnibus clause, we have held that a witness can be convicted under § 1503 on the basis of statements made under oath before a judge. *United States v. Gonzalez-Mares*, 752 F.2d 1485, 1491–92 (9th Cir. 1985); *see also Griffin*, 589 F.2d at 205–06 (rejecting the argument that the legislative history of § 1503 militates against applying the statute to a witness's in-court statements).

Bonds cites an early case in which we described the statute as applying to threatening conduct occurring outside of the courtroom. We once said that § 1503 "seem[ed] to be limited to intimidating actions" against witnesses and jurors. *United States v. Metcalf*, 435 F.2d 754, 757 (9th Cir. 1970). This court and the Supreme Court, however, have subsequently recognized that § 1503 applies to a witness's in-court testimony. In *Rasheed*, we clarified *Metcalf* and ruled that § 1503's scope was not limited to "intimidating actions." 663 F.2d at 852 ("The use of the word 'corruptly' in the statute is a clear indication that not every violation of [§] 1503 involves threats or intimidation."). Later in *Gonzalez-Mares* we made it clear that § 1503 applies to false statements a defendant makes under oath to a judge. 752 F.2d at 1491. The Supreme Court confirmed our interpretation of § 1503 when it concluded that one who delivers false testimony or documents directly to the grand jury violates § 1503, because such conduct "all but assures that the grand jury will consider the material in its deliberations." *Aguilar*, 515 U.S. at 601.

Bonds's contention that his conviction should be reversed on the ground that § 1503 does not apply to a witness's statements before the grand jury is therefore foreclosed by established precedent.

III.

Bonds next argues that the use of the word "corruptly" in § 1503 is unconstitutionally vague and failed to put him on notice that his conduct was criminal. The word "corruptly" in the omnibus clause of § 1503 provides the mens rea of the statute and means that the obstructive conduct "must be done with the purpose of obstructing justice." *Rasheed*, 663 F.2d at 852.

Bonds relies on the D.C. Circuit's opinion in *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), to support his claim that the term "corruptly" is unconstitutionally vague. *Poindexter*, however, involved an as-applied challenge to a different statute, 18 U.S.C. § 1505, that proscribes corruptly obstructing or impeding a congressional or agency proceeding. The court ruled that § 1505's use of the term "corruptly" was "too vague to provide constitutionally adequate notice that [§ 1505] prohibits lying to Congress." *Id.* at 379. Even though the use of "corruptly" in § 1505 was borrowed from § 1503, the *Poindexter* court itself cautioned other courts against finding that the term as used in § 1503 was unconstitutionally vague. *Id.* at 385. The court noted that § 1503 and § 1505 are so "materially different" that the interpretation of § 1505 should not guide the interpretation of § 1503. *Id.*

The courts examining this issue, including the D.C. Circuit that decided *Poindexter*, have thus refused to extend

Poindexter's holding to § 1503. *See, e.g.*, *United States v. Russo*, 104 F.3d 431, 435–36 (D.C. Cir. 1997); *United States v. Watt*, 911 F. Supp. 538, 545–47 (D.D.C. 1995); *see also Griffin*, 589 F.2d at 206–07 (rejecting the argument that the term "corruptly" in § 1503 is unconstitutionally vague). Bonds cannot cite any case reversing a § 1503 conviction on the theory that the term "corruptly" in § 1503 is unconstitutionally vague. The most he can cite is a footnote in which an en banc panel of this court noted that *Poindexter* raised an issue of whether the term "corruptly" in § 1503 was unconstitutionally vague. *United States v. Aguilar*, 21 F.3d 1475, 1486 n.8 (9th Cir. 1994) (en banc), *aff'd in part, rev'd in part*, 515 U.S. 593, 606 (1995). The Supreme Court reviewed *Aguilar*, but the majority resolved the case without addressing the vagueness argument. *See Aguilar*, 515 U.S. at 600 & n.1.

Although the majority in *Aguilar* did not reach the vagueness issue, the dissenters did. Justice Scalia, joined by Justices Kennedy and Thomas, dissented and expressly rejected the contention that the term "corruptly" in § 1503 is unconstitutionally vague. *Id.* at 616–17 (Scalia, J., dissenting). The dissent noted that it is "well-accepted" that the term "corruptly" means "[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others . . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another." *Id.* (internal quotation marks omitted) (omission in original).

Therefore, the only opinions discussing vagueness challenges to the use of the term "corruptly" in § 1503 have rejected such challenges. Their analysis is sound, and there

is no basis for holding that Bonds lacked notice that he could be punished under § 1503 for providing the grand jury with misleading or evasive testimony. Grand jury testimony "intended to influence, obstruct, or impede, the due administration of justice [is] obviously wrongful, just as [it is] necessarily 'corrupt.'" *Id.* (internal quotation marks omitted).

IV.

Bonds also contends that the indictment was insufficient because Statement C was not explicitly referenced or quoted in the indictment. An indictment is sufficient if it contains all of the elements of the offense charged so that it informs the defendant of the charge, and enables the defendant to use the indictment to prevent "future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). The obstruction of justice count read in relevant part as follows:

> On or about December 4, 2003, in the Northern District of California, the defendant, Barry Lamar 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 made by the defendant as charged in Counts One through Four of this Indictment. All in violation of Title 18, United States Code, Section 1503.

The indictment put Bonds on notice that he could be convicted of violating § 1503 for any material false, misleading, or evasive statement he made during his grand jury testimony. During the pre-trial stage of the case, the district court limited the statements the jury could actually consider, and the government proposed jury instructions identifying eleven separate statements that could constitute an obstruction of justice. Then, before the jury was instructed, the number of obstructive statements was further reduced by the court. The jury was instructed correctly that to convict, it had to agree unanimously on which statement or statements qualified as intentionally evasive, false, or misleading.

Bonds argues that the listing of specific statements somehow, and improperly, expanded the indictment. A listing of statements might be problematic if the original indictment charged a few specific obstructive statements, and the jury instructions later added other statements. *See United States v. Shipsey*, 190 F.3d 1081, 1086–87 (9th Cir. 1999) (jury instructions are improper if they permit the jury to convict under a theory not included in the indictment).

That scenario, however, did not occur in Bonds's case. The indictment here covered any false, misleading, or evasive statement he made during his grand jury testimony. The listing of specific statements in the jury instructions, therefore, narrowed the statements for which Bonds could be convicted. Narrowing an indictment via jury instructions is permissible. *United States v. Wilbur*, 674 F.3d 1160, 1178 (9th Cir. 2012). The indictment was sufficient.

V.

Bonds last challenges the district court's rejection of his request to modify the jury instructions. Bonds requested that the instructions for the obstruction count contain the words "when considered in its totality," such that the instructions would have read "by knowingly giving material testimony that, when considered in its totality, was intentionally evasive, false, and misleading."

The district court correctly rejected Bonds's proposed addition because it added little or nothing to the instructions given, and was covered adequately by those instructions. *See United States v. Thomas*, 612 F.3d 1107, 1120 (9th Cir. 2010). The jury knew it had to consider statements in context because it was instructed to "consider[] all the evidence," and was instructed that a statement was material "if it had a natural tendency to influence, or was capable of influencing, the decision of the grand jury." To the extent Bonds's proposed language deviated from the given instructions by implying that the jury had to find that Bonds's entire testimony was evasive or misleading in order to convict him, Bonds's proposed language was incorrect. The indictment and the jury instructions made clear that Bonds could be convicted on the basis of individual statements that were evasive or misleading.

CONCLUSION

The judgment of the district court is **AFFIRMED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
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Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
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* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____, Deputy Clerk