

DENNIS P. RIORDAN
DONALD M. HORGAN

RIORDAN & HORGAN

ATTORNEYS AT LAW
5 23 OCTAVIA STREET
SA N FRANCISCO, CA 94102
T ELEPHONE (415) 431-3472
F AX (415) 552-2703

E-MAIL: INFO@RIORDAN-HORGAN.COM

April 7, 2014

Ms. Molly Dwyer
Clerk, U.S. Court of Appeals
Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States v. Bonds*, No. 11-10669

Dear Ms. Dwyer:

The panel opinion affirming Mr. Bond's conviction for obstruction of justice was issued on September 13, 2013. Mr. Bond's petition for rehearing en banc was filed on October 28, 2013. The Court ordered the government to submit a response, which was filed on January 8, 2014. Pursuant to Fed. R. App. P. 28(j), Mr. Bonds submits for the Court's consideration a recent decision of another panel: *United States v. Ward*, No. 12-50536 (April 3, 2014) (attached as an Appendix)

The *Ward* panel faced a claim of constructive indictment, which "occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them." Slip op. at 11 (internal quotation marks omitted). *Ward* clarified the meaning of constructive amendment. It held that where "conduct necessary to satisfy an element of the offense is charged in the indictment and the government's proof at trial includes uncharged conduct that would satisfy the same element," the district court's instructions must ensure that "the jury convicted the defendant based solely on the conduct actually charged in the indictment." Slip op. at 15.

Ward relied in part on *Stirone v. United States*, 361 U.S. 212 (1960), and *United States v. Tsinhnahjinnie*, 112 F.3d 988 (9th Cir. 1997). Mr. Bonds also relied on both cases in arguing that his obstruction conviction was based on a statement before the grand jury which was not alleged in the indictment—and indeed was consciously deleted. Neither case was addressed by the three-judge panel.

Mr. Bonds submits that *Ward* provides further support for his petition for rehearing en banc based on constructive amendment. (See Rehearing Petition at 16-18).

Respectfully submitted,

/s/ Dennis P. Riordan
DENNIS P. RIORDAN

Attorney for Defendant-Appellant
BARRY LAMAR BONDS