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 OPENING BRIEF

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INTRODUCTION

This criminal appeal is of extraordinary importance for reasons having nothing to do with the celebrity of the defendant. Barry Bonds was convicted of a felony based on conduct with which he was not charged by indictment, as the Grand Jury Clause requires. Even more remarkably, that conduct—making a truthful albeit rambling and irrelevant statement under oath—occurs daily in courtrooms around the country. No judicial decision of this or any other federal court has ever found a truthful statement to constitute an obstruction of justice. Mr. Bonds's uncharged statement was not a crime, and his conviction offends fundamental principles of statutory interpretation and constitutional standards of due process.

This case arose out of the federal government's efforts to combat steroid use in sports. That crusade, while admirable in its underlying purpose, has been pursued with an intensity at times bordering on zealotry. Mr. Bonds, then one of the world's most famous athletes, became a prized target of the federal government's war on steroids after his 2003 grand jury testimony. The government believed that Mr. Bonds lied under oath about his steroid use. It thus instigated this lengthy and expensive criminal prosecution. But for a variety of reasons, the government's essential case against Mr. Bonds—a case about lying under oath—crumbled. Although the federal government succeeded in tarring Mr.

Bonds's reputation, it ultimately failed to prove beyond a reasonable doubt that he made a single false statement before the grand jury.

The government did, however, obtain a single count of conviction for obstruction of justice under 18 U.S.C. § 1503. That count was based not on any false testimony, but rather on Mr. Bonds's ruminations about the difficulties of being a "celebrity child." Admittedly, that discursion was entirely irrelevant to the grand jury proceedings. But at the time he digressed, there was no question pending, and in any event, the very irrelevance of the remark proves its immateriality. Moreover, as to the question that had most recently been asked by prosecutors, Mr. Bonds almost immediately gave direct and truthful answers to that same question on the several occasions when it was repeated. The government nonetheless contended below that Mr. Bonds's "celebrity child" digression was equivalent to a refusal to answer a question, and was therefore a crime.

But at the time of the grand jury testimony, the government never initiated contempt proceedings and never once suggested that Mr. Bonds had refused to answer any questions. It was not until late in these proceedings, and years after the testimony, that the government decided the "celebrity child" statement was obstructive. The government's belatedly invented legal theory has no support in the obstruction statute or the case law interpreting that statute. Other statutes specifically criminalize false statements under oath and a refusal to testify when

the law requires a witness to do so. *See* 18 U.S.C. §§ 1623, 401. Rambling under oath, however, is not a federal crime.

Furthermore, it is impossible to conclude that Mr. Bonds was convicted on facts as to which the grand jury found probable cause. Although his indictment listed specific statements by which Mr. Bonds allegedly obstructed the grand jury, the testimony upon which his conviction is based was not among them. The government should not be allowed to salvage this misguided prosecution by minting a new theory of obstruction and creating a new criminal offense. Mr. Bonds's conviction cannot stand.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. This appeal is from a final judgment of conviction, entered by the district court on December 16, 2011. (ER 33-38.) The notice of appeal was filed on December 21, 2011. (ER 30-32.)

BAIL STATUS

Mr. Bonds is not in custody. He was sentenced to a term of probation including home confinement, but pursuant to the district court's order of December 21, 2011, execution of his sentence was stayed pending the outcome of this appeal.

STATEMENT OF THE CASE

Mr. Bonds was initially indicted for several counts of perjury and obstruction of justice on November 15, 2007. Prior to trial, the defendant moved to exclude certain hearsay evidence, and the district court granted his motion. The government unsuccessfully appealed, *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010), and the case returned to district court for trial.

The government filed three superseding indictments. The third superseding indictment, consisting of five counts, was filed on February 10, 2011. (ER 190-98.) Counts One through Four alleged false declarations before a jury in violation of 18 U.S.C. § 1623(a). Count Five alleged obstruction of justice in violation of 18 U.S.C. § 1503.

Jury trial commenced before the Honorable Susan Illston on March 21, 2011. The government voluntarily dismissed Count Four at the close of its case-in-chief. (Dkt. 349.) The jury returned its verdict on April 13, 2011. (Dkt. 373.) It was divided as to the false declaration charges in Counts One through Three. The district court declared a mistrial as to those counts, and they were subsequently dismissed. (Dkt. 417.) The jury found Mr. Bonds guilty of Count Five, the obstruction charge.

Judge Illston imposed a judgment and sentence on December 16, 2011. (Dkt. 423.) Mr. Bonds was sentenced to two years probation, including a period of

30 days of home confinement. Judge Illston stayed imposition of the sentence pending appeal. Mr. Bonds timely appealed. (Dkt. 424.)

STATEMENT OF FACTS

A. Background

Appellant Barry Bonds is a former Major League Baseball player. In 2003, the government began to investigate Balco Laboratories for the illegal distribution of steroids and other performance-enhancing drugs to athletes. The government executed a search warrant at Balco's headquarters and discovered evidence that Mr. Bonds and other athletes had a relationship with Balco.

Along with several other athletes, Mr. Bonds was subpoenaed to appear before the federal grand jury investigating Balco. He testified on December 4, 2003. In his testimony, Mr. Bonds admitted that he had a relationship with Balco, and he admitted that he had received supplements from Balco through his personal trainer Greg Anderson. He admitted that he had taken substances known as "the cream" and "the clear" given to him by Anderson. He denied, however, that he had knowingly used steroids provided by Balco.

B. Counts One Through Four—False Declarations

Trial below focused primarily on the government's allegations that Mr. Bonds lied to the grand jury four times in violation of 18 U.S.C. § 1623. In Counts One through Four, the government charged four alleged instances of false

testimony by Mr. Bonds: (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.

In an attempt to prove those counts at trial, the government presented a variety of evidence aimed at showing that Mr. Bonds had knowingly received steroids from Anderson and Balco. Among other things, it presented evidence that Mr. Bonds got physically larger and stronger during the relevant time period. It called Mr. Bonds's estranged former mistress, who testified to Mr. Bonds's physical and behavioral changes. It called a former business partner who said that Mr. Bonds had asked him to research steroids, and it called a former assistant who said that she had once seen Anderson inject Bonds with something. It also called other current and former professional athletes who testified that they had received "steroid-like" substances or "alternatives to steroids" from Anderson and Balco.

In short, most of the evidence at trial was aimed at demonstrating that Mr. Bonds testified falsely and thus at proving the four § 1623 counts. But the government was ultimately unable to prove any of those counts beyond a reasonable doubt. The government voluntarily dismissed Count Four during trial, and the jury was deadlocked as to Counts One, Two, and Three, which were subsequently dismissed on the government's motion. Consequently, much of the

evidence presented at trial is substantially irrelevant to the issues presented in this appeal. Many of the legal and evidentiary questions debated in the district court are likewise moot. Appellant's brief thus focuses on the lone count of conviction for obstruction of justice.

C. Count Five—Obstruction of Justice

Mr. Bonds was ultimately convicted of a single count of obstruction of justice in violation of 18 U.S.C. § 1503. His conviction was based not on any false testimony, but rather on a passage of testimony known as Statement C or the "celebrity child" statement. The government contended that Mr. Bonds's testimony in Statement C was evasive of the prosecutor's previous question and therefore obstructive.

1. Indictment, Jury Instructions, and Conviction

The indictment on which Mr. Bonds was tried did not mention Statement C. The indictment simply stated that Mr. Bonds gave 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.) Thus, the indictment only gave specific notice that the government would pursue an obstruction conviction based on the four statements alleged in the false declaration counts.

In pretrial proceedings, the government maintained that the obstruction charge was based on Mr. Bonds's entire testimony rather than any particular statement. It stated: "This count rests on Bonds's grand jury testimony as a whole, not on individual questions and answers." (ER 230.) Nonetheless, in addition to the statements separately charged as § 1623 violations, which were specifically referenced in the obstruction charge, the government also sought to give the jury the option of convicting Mr. Bonds based on other individual statements, none of which was mentioned in the indictment. The government first requested instruction on twelve uncharged statements (ER 208-14), later reducing the number to seven. (ER 186.3-89.) Both prior to and during trial, Mr. Bonds objected on multiple grounds to the government's attempt to use any such statements as a basis for the obstruction charge (Dkt. 194 [motion to dismiss or strike]; ER 45-49; ER 162-63), but the district court ultimately agreed to instruct the jury on four of the uncharged statements.

Thus, the jury was given the option of convicting Mr. Bonds of obstruction based on one of seven individual statements. (ER 157-59 [final instructions].) First, it could convict him on one of the three statements made in the three remaining § 1623 counts. Second, it could convict him on one of the four uncharged statements, which were labeled Statement A, Statement B, Statement C, and Statement D. The jury's verdict form required a finding of unanimity as to one

or more of the seven statements. It found Mr. Bonds guilty based solely on Statement C. (ER 40.)

2. Mr. Bonds's Testimony in Statement C

Mr. Bonds's testimony in Statement C appears on page 42 of his grand jury transcript. Statement C, the "celebrity child" statement, was made following a question about whether Anderson ever gave Mr. Bonds injectable steroids. The underlined portion represents Statement C:

> 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 158 [instructions]; ER 301-02 [grand jury testimony].)

3. Related Testimony

Statement C did not respond to anything in particular, and it did not respond to the question previously asked about self-injectable steroids. Immediately after the exchange quoted above, however, the prosecutors returned to the same subject, and Mr. Bonds repeatedly responded directly and in the negative:

> Q. Did either Mr. Anderson or Mr. Conte ever give you a liquid that they told you to inject into yourself to help you with this recovery type stuff, did that ever happen?
>
> A. No.

(ER 302.)

> Q. 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?
>
> A. 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.
>
> Q. So --
>
> A. So sorry.
>
> Q. – 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?
>
> A. No, no.

(ER 303.)

Q. Just to follow-up before I go on to my other thing, have you ever yourself injected yourself with anything that Greg Anderson gave you?

A. I'm not that talented, no.

(ER 303.)

Q. And, again, I guess we've covered this, but – and did he ever give you anything that he told you had to be taken with a needle or syringe?

A. 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.

Q. Okay. So, just so I'm clear, the answer is no to that, he never gave you anything like that?

A. Right.

(ER 306.)

Q. Did Greg ever give you testosterone in injectable form for you to take?

A. No.

(ER 308.)

In sum, the subject of whether Anderson ever gave Mr. Bonds injectable steroids was covered exhaustively throughout the grand jury testimony. When first asked about the subject, Mr. Bonds responded by saying "I've only had one doctor touch me," and then continued with a rambling statement about his family history

and private life, including Statement C. When subsequently asked the same or similar questions, Mr. Bonds repeatedly and consistently testified that Anderson had not given him injectable steroids.

4. Jury Arguments Below

The prosecution did not present any evidence to show that anything in Statement C was false. It was undisputed that Mr. Bonds was, in fact, a celebrity child; his father, Bobby Bonds, was himself a record-setting major league baseball player. Indeed, the prosecution conceded both to the district court and the jury that Statement C was true. (ER 165.1; ER 69.) It contended, however, that Mr. Bonds's long answer in Statement C was an attempt to avoid answering the previous question that the prosecutor had asked.

In its closing argument to the jury, the government argued that Mr. Bonds "sought again and again to avoid answering questions about injections . . . by providing not outright false testimony, but basically misleading statements in connection to the questions he was asked." (ER 69.) As to Statement C in particular, the government's summation consisted of the following:

> He goes on in this answer to talk about not knowing what's in his wife's purse, what's it like to be a celebrity child, I don't know get into other people's business because of my father's situation.
>
> The defendant is refusing to answer the question because it's a question about being injected because the defendant cannot tell the truth of being injected because as you all know he's been

> injected by Anderson on a number of occasions, that's why this answer goes off into the cosmos, he cannot answer it.

(ER 116.) The government thus argued to the jury that the "celebrity child" statement, though literally truthful, was obstructive because it went "off into the cosmos." But the government did not dispute that Mr. Bonds had answered that same question directly and repeatedly before the grand jury, nor did it claim at trial, nor offer any evidence, that his direct answers to the self-injection questions were false.

SUMMARY OF ARGUMENT

Mr. Bonds presents the following claims on appeal.

First, he is entitled to acquittal on Count Five because 18 U.S.C. § 1503 does not cover his conduct. False statements under oath are subject to prosecution under § 1623. Even if § 1503 has been properly extended to cover *false* statements by grand jury witnesses—which is dubious—it cannot be extended further to cover *truthful* statements. Furthermore, where witnesses refuse to answer questions, the proper course is to prosecute that conduct as contempt under § 401. As a matter of law, truthful testimony that merely fails to respond directly to a prosecutor's question does not constitute obstruction. Indeed, there is no case law in any circuit holding that truthful testimony can constitute obstruction of justice.

Second, even if a truthful statement could constitute obstruction in some cases, Mr. Bonds's "celebrity child" remark was not actually obstructive in this

case because it was neither evasive nor material. There was no question pending when Mr. Bonds spoke of his family's celebrity status; the supposedly evasive testimony was actually encouraged by the prosecutor; and Mr. Bonds directly answered the same question when prosecutors repeated it. Mr. Bonds's "celebrity child" remark was an irrelevant but temporary digression. Moreover, because it was irrelevant, it cannot meet the requirement of materiality, which is an element of the offense under § 1503. Indeed, the prosecutor effectively conceded Statement C's immateriality when he described it to the jury as going "off into the cosmos."

Third, Mr. Bonds's conviction must be reversed because the indictment was deficient. Even assuming the validity of the theory of obstruction presented by the government at trial, that legal and factual theory was never presented to the grand jury. The indictment did not mention Statement C. The grand jury never found probable cause that the "celebrity child" statement obstructed justice, and the indictment failed to notify the defendant of the charges he would face at trial. By submitting Statement C to the petit jury as a basis for conviction, the district court effected an impermissible constructive amendment of the indictment.

Fourth, if the government's theory of obstruction were valid, then the district court's instructions to the jury were fatally deficient. The government claimed that the indictment was not deficient in failing to mention Statement C

because Mr. Bonds was accused of obstructing justice in the totality of his testimony, not in any single statement. Additionally, the law requires that supposedly false or obstructive statements be examined in context. The jury thus should have been instructed, as the defense requested, that it could not find Mr. Bonds guilty unless his statement, considered in light of the totality of his testimony, was false, misleading, and evasive. The district court's rejection of that instruction is yet another reason Mr. Bonds's conviction must be reversed.

ARGUMENT

I. THE CONVICTION MUST BE REVERSED BECAUSE TRUTHFUL STATEMENTS DO NOT CONSTITUTE OBSTRUCTION OF JUSTICE UNDER 18 U.S.C. § 1503

The trial jury convicted Mr. Bonds of obstruction of justice under 18 U.S.C. § 1503.[1] That conviction was based not on any false statements, but rather on Mr.

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[1] Section 1503(a) reads:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

Bonds's rambling "celebrity child" remark in Statement C. The government conceded before the jury that Statement C was truthful.[2] (ER 69.) The government's theory was that Statement C was obstructive because it evaded the question that the prosecutor previously had asked.

The government's theory is legally incorrect, and Mr. Bonds's conduct did not constitute a crime under § 1503.

First, it is doubtful whether § 1503 may be constitutionally applied to a witness's own testimony at all. *Second*, even if § 1503 properly covers a witness's own testimony, it only covers false testimony, and it cannot be expanded to reach truthful testimony that is merely unresponsive. There is no case, in this Circuit or any other, that has ever affirmed a conviction for obstruction based on truthful testimony. In order to save its lone count of conviction in this otherwise failed prosecution, the government is seeking a dramatic expansion of a statute that has already been unconstitutionally expanded far beyond its original purpose.

[2] In its post-trial order, the district court rejected any claim by the government that "Statement C might have been false," and did so "particularly since the government did not argue this reading to the jury." (ER 12 n.5.)

Regardless of whether § 1503 has been properly expanded to reach false testimony, it may not be expanded—retroactively—to cover truthful testimony. Mr. Bonds is therefore entitled to acquittal as a matter of law.[3]

A. Section 1503 Was Not Intended to Cover a Witness's In-Court Conduct

The government's legal theory is that truthful testimony by a grand jury witness can constitute obstruction of justice if the testimony is not directly responsive to the prosecutor's question. In fact, a careful examination of the text and history of the obstruction statute demonstrates that it was not intended to cover witnesses' testimony at all, truthful or not. In light of that text and history, the government's proposed legal theory is radical and unsupported.

1. The History of the Federal Obstruction Statute

The irony of this prosecution is that the federal obstruction statute was originally enacted as a *limitation* on obstruction prosecutions. The purpose of the predecessor statute—the Contempt Act of March 2, 1831—was to limit the government's ability to punish citizens who committed acts that supposedly brought the justice system into disrepute.

[3] When an argument for acquittal rests on a question of statutory interpretation, the ruling below is reviewed de novo. *United States v. Havelock*, 664 F.3d 1284, 1289 (9th Cir. 2012) (en banc). Both at the close of the government's case-in-chief and after the jury's verdict, Mr. Bonds moved for acquittal under Rule 29. (Dkt. 337; Dkt. 396.)

a. The Peck-Lawless Case

The original obstruction statute was passed in response to a nationwide political scandal following the Peck-Lawless case, which arose out of frontier land disputes.[4] In 1826, federal judge James H. Peck presided over a trial involving land disputes in Louisiana Purchase territory. He issued a ruling that effectively invalidated hundreds of claims worth vast sums of money. Luke Lawless, an attorney for many of the losing claimants, published a stinging critique of Peck's ruling. Judge Peck held Lawless in contempt. He found that Lawless misrepresented the basis of the decision and had thus sought to obstruct justice by prejudicing the community and potential jurors.[5]

Lawless took his case to Congress. In April of 1830, the House impeached Judge Peck for abuse of judicial powers. A lengthy Senate trial ensued. Peck's accusers, led by then-Representative James Buchanan, called him a "judicial tyrant" who had engaged in "inquisitorial" practices reminiscent of England's reviled Star Chamber. They conceded that, under English law, "All acts which obstruct the due administration of justice, positively, fall within the crime of

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[4] *See generally* Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States—To the Federal Contempt Statute*, 28 Colum. L. Rev. 401 (1928).

[5] Statement of Judge Peck to the House of Representatives, April 13, 1830, *reprinted in* Arthur J. Stansbury, *Report of the Trial of James H. Peck* 16-39 (1833).

contempt."[6] But they argued that Peck's application of that principle contravened American notions of justice.

Even Peck's defenders agreed that he had overstepped his bounds by finding Lawless in contempt. They conceded that his actions, more than Lawless's article, had stained the integrity of the courts, but argued that removal from office was not warranted. Peck was narrowly acquitted by a vote of 22 to 21.

b. The Contempt Act of March 2, 1831

Congress sought to ensure that Judge Peck's acquittal would not be viewed as endorsing his conduct. Immediately after trial, it enacted the following bill:[7]

> *An Act declaratory of the law concerning contempts of court*.
>
> Be it enacted, etc., That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.

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[6] Statement of Rep. Wicklyffe, Jan. 18, 1831, *reprinted in* Stansbury, *supra*, at 313.

[7] *See* Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study of Separation of Powers*, 37 Harv. L. Rev. 1010, 1025-28 & n.75 (1924).

> Sect. 2. And be it further enacted, That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offence.

Act of March 2, 1831, 4 Stat. 487.

The law had two sections. Section 1 covered "direct" contempts, including disobedience of process and "misbehaviour" while physically proximate to a federal court. *See* 4 William Blackstone, *Commentaries* * 280-81 (discussing "direct" and "consequential" contempts). Section 2 was aimed at punishing "corrupt overtures, out of court, to judges, jurors or witnesses."[8] It was added by the Senate as an amendment—the original House proposal included only Section 1.

> The Senate's Amendment to the Act declaratory of the powers of the Courts of the United States on the subject of contempts; adding a second section for punishing all attempts to corrupt or intimidate jurors, &c., was amended on the suggestion of Mr. BUCHANAN, and then agreed to.[9]

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

[9] *National Intelligencer* (Washington D.C.), March 3, 1831, at 3; *accord Niles Weekly Register* (Baltimore), March 5, 1831, at 7.

Section 1 of the Contempt Act of 1831 survives today as 18 U.S.C. § 401, the modern contempt statute. Section 2 survives as the "omnibus clause" of 18 U.S.C. § 1503, the modern obstruction statute.[10] That is the provision that Mr. Bonds is alleged to have violated.

c. The Purpose of the Statute

The legislative history supports two inferences about the meaning of the obstruction statute. First, the statute was intended to limit rather than expand the government's power to punish citizens who refused to accede to the power of the federal courts. As the Supreme Court has said, the Peck-Lawless case "served as the occasion for a drastic delimitation by Congress of the broad undefined power" to punish contempts. *Nye v. United States*, 313 U.S. 33, 45 (1941).

Second, the obstruction statute was intended to cover out-of-court attempts to bribe or threaten witnesses, jurors, or judges. While Section 1 of the original Contempt Act punished *in-court* misconduct, Section 2 punished *out-of-court* misconduct. *See United States v. Essex*, 407 F.2d 214, 217 (6th Cir. 1969) ("The principal distinction then, between Section 1 and Section 2 of the Act of March 2, 1831 . . . was geographical . . . ."). Section 2, now the obstruction statute, was not

[10] In 1909, Section 2 was recodified as Section 241 of the United States Criminal Code. Act of March 4, 1909, ch. 321, § 135, 35 Stat. 1113. In 1948, it was recodified again as part of 18 U.S.C. § 1503. Act of June 25, 1948, ch. 645, 62 Stat. 769-70.

intended to cover any misconduct arising out of a witness's own in-court testimony.

In expanding the statute to reach Mr. Bonds's conduct, the government and the district court below relied heavily on this Court's remark that "the obstruction of justice statute was designed to proscribe all manner of corrupt methods of obstructing justice." *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1984). That statement, however, has no support in the legislative history. Indeed, as an expression of Congressional intent, it is simply untrue.[11] The government's broad theory of this case echoes the same arguments made by Judge Peck nearly two centuries ago. That theory is precisely what the obstruction statute was designed to reject.

2. Case Law Interpreting § 1503

This Court's case law applying § 1503 has not been entirely consistent. For a time, this Court adopted a very limited construction, but it subsequently expanded the statute's reach. Yet at the same time, this Court has recognized that constitutional concerns might require a narrower construction than some cases

[11] For a time, the Supreme Court itself made a similar mistake about the purpose of the statute. At one point, the Court stated that the original Contempt Act "imposed no limitations not already existing" on the power to punish contempts. *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 418 (1918). But in response to the historical evidence presented by then-Professor Frankfurter, the Court admitted its mistake: "The inaccuracy of that historic observation has been plainly demonstrated." *Nye*, 313 U.S. at 47.

have given it. In fact, that constitutional question remains unresolved in this Circuit.

a. Judicial Expansion of § 1503

Initially, this Circuit adopted a narrow interpretation of the obstruction statute. Relying on its text, the *ejusdem generis* canon, and the rule of lenity, this Court held that § 1503 should be "limited to intimidating actions" against witnesses or jurors. *United States v. Metcalf*, 435 F.2d 754, 757 (9th Cir. 1970); *see also Haili v. United States*, 260 F.2d 744 (9th Cir. 1958). In subsequent cases, however, this Court disavowed its earlier precedent as "dicta" and expanded the reach of the statute. *Rasheed*, 663 F.2d at 851-52;[12] *see also United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984); *United States v. Brown*, 688 F.2d 596 (9th Cir. 1982).

Then, most importantly, in *United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir. 1984), this Court expanded the statute to cover a witness's own actions on the stand. Relying on case law from other circuits, this Court held that "[f]alse

[12] *Rasheed* stated that the critical portion of *Metcalf* was "dicta" because it was merely an alternate ground for the decision. But as this Court has repeatedly stated, "[a]lternative holdings are not dicta." *English v. United States*, 42 F.3d 473, 485 (9th Cir. 1994). *Rasheed's* refusal to follow *Metcalf* violated this Court's rule that "a prior decision has binding effect to the extent that 'it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue.'" *United States v. Cassel*, 408 F.3d 622, 633 n.9 (9th Cir. 2005) (quoting *United States v. Johnson*, 256 F.3d 895, 916 (9th Cir. 2001) (en banc) (plurality op. of Kozinski, J.)).

statements made under oath may, under some circumstances, constitute obstruction of justice under § 1503." *Id*. at 1491. The *Gonzalez-Mares* Court was careful to limit the reach of its holding—it left open the possibility that "false testimony without more" might not violate the statute. *Id*. Nonetheless, it effectively transformed § 1503 from a witness tampering statute into a perjury statute.

That holding was incorrect on a number of grounds. First, nothing in the text of the statute itself refers to a witness's own testimony. Second, the legislative history of the statute directly contradicts any argument that the statute was intended to cover a witness's false statements. *See Essex*, 407 F.2d at 218 ("Neither the language of Section 1503 nor its purpose make the rendering of false testimony alone an obstruction of justice."). Third, extending the obstruction statute to cover perjury makes little sense as a matter of statutory structure. When Congress wants to punish false statements under oath, it does so explicitly—as it has in other statutes. *See, e.g.*, 18 U.S.C. § 1515(b). Fourth, the ruling in *Gonzalez-Mares* contravenes constitutional principles that textual ambiguity must be resolved in favor of lenity, *United States v. Santos*, 553 U.S. 507, 514 (2008), and textual vagueness requires a narrowing construction, *Skilling v. United States*, 130 S. Ct. 2896, 2929-31 (2010).

b. Renewed Constitutional Concerns

After *Gonzalez-Mares*, this Court indicated that constitutional concerns might require a narrower construction of § 1503. Those concerns were first raised in the D.C. Circuit's seminal opinion in *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991). Among other things, *Poindexter* unearthed a variety of historical material that this Court had never previously considered. *Id*. at 381-85. It also noted that the case law on § 1503 was far less consistent than this Court had suggested in *Gonzalez-Mares.* "Courts construing § 1503 have adopted a wide variety of interpretations . . . ." *Id*. at 385. The *Poindexter* court concluded that the term "corruptly" risked constitutional vagueness, and thus could not be applied to a witness's own testimony.[13]

A few years later in *United States v. Aguilar*, 21 F.3d 1475 (9th Cir. 1994), an en banc panel of this Court cited *Poindexter's* extensive analysis with approval. This Court decided the case on other grounds, but it noted the serious and unresolved constitutional question raised by *Poindexter*:

> We find *United States v. Poindexter* . . . most helpful on this point. In that case the D.C. Circuit held that the term "corruptly," as used in 18 U.S.C. § 1505, was unconstitutionally

[13] Congress responded to *Poindexter* by enacting § 1515(b), which 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 other information." Notably, it did not apply that expanded definition of "corruptly" to § 1503.

> vague as applied to Poindexter's false statements to Congress. The court's interpretation of section 1505 was based on section 1503, since the language of section 1505, including its "omnibus clause," was borrowed from section 1503.
>
> The *Poindexter* court found that while the defendant's false statements violated section 1001, they were not obviously encompassed within section 1505's prohibition against corruptly influencing, obstructing or impeding a congressional inquiry. The court found that the term corruptly—although "at least as used in § 1503, . . . is something more specific than simply 'any immoral method used to influence a proceeding,'"—did not give constitutionally sufficient notice that it prohibited false statements to Congress. *Poindexter*, 951 F.2d at 382, 386. Our construction of section 1503 renders this constitutional inquiry unnecessary, but we note that the constitutional issue raised and decided adversely to the Government in *Poindexter* is nearly identical to the issue that is present here and that we would be required to conduct the same analysis as the D.C. Circuit were we to construe the statute in the manner urged by the prosecution.

Id. at 1486 n.8. When the Supreme Court heard *Aguilar*, it likewise recognized but declined to reach the defendant's constitutional vagueness arguments because it reversed his conviction on other grounds. 515 U.S. 593, 600 & n.1 (1995).

The constitutional question decided by *Poindexter* and recognized by *Aguilar* remains open in this Circuit. In some subsequent cases, this Court has continued to assume that § 1503 applies to a witness's false statements under oath. *See United States v. Thomas*, 612 F.3d 1107, 1125-27 (9th Cir. 2010). But it has never addressed, much less resolved, the vagueness problems raised by the text of the statute or the constitutional problems created by the judicial expansion of the

statute in cases like *Gonzalez-Mares*. It remains an open question in this Circuit whether § 1503 may be constitutionally applied to witness testimony *at all*.

B. Section 1503 Cannot Be Further Expanded to Cover Truthful Testimony

This Court may now address the broad constitutional question left open by *Aguilar*. An honest and full examination of that question would mandate reversal. If ordinary principles of statutory interpretation were applied to § 1503—examining the text, history, and structure of the statute, in light of related provisions —it would not cover a witness's testimony. The text is vague, thus mandating a narrow construction. The ruling in *Gonzalez-Mares* was ill-considered and inconsistent with this Court's prior binding precedent, which should still control. *Poindexter* was correctly decided and should be followed by this Court.

Alternatively, however, this Court could defer resolution of those issues because this particular case may be resolved on a much narrower ground: even assuming that *Gonzalez-Mares* remains good law after *Aguilar*, it cannot be expanded further. In other words, what the government is seeking in this case is not simply affirmation of *Gonzalez-Mares* and favorable resolution of the constitutional question left open by *Aguilar*. Rather, the government seeks an even greater judicial expansion of § 1503.

Gonzalez-Mares and its progeny stand for the proposition that *false* statements under oath may, under some circumstances, constitute obstruction of justice. But in this case, Mr. Bonds's "celebrity child" remarks in Statement C were not false. They were, at worst, truthful but irrelevant. The government is thus asking this Court to extend *Gonzalez-Mares* further to cover *truthful* testimony. Even if the *Gonzalez-Mares* rule itself were justified as a matter of statutory interpretation (which it is not) and consistent with the Constitution (which it is not), it cannot be extended further to cover true statements.

1. Case Law on "Evasive" Testimony

Throughout these proceedings, the government has never cited a single published case—in any federal circuit or district court— in which a defendant has been convicted of violating § 1503 for giving truthful testimony. As the district court stated after hearing extensive arguments on the matter, "the parties have pointed to no reported decisions reviewing such a conviction." (ER 12 [Rule 29 Order].) That is because no such decision exists.

In extending the statute to cover truthful but unresponsive answers, the district court and the government relied almost entirely on two out-of-circuit cases: *United States v. Cohn*, 452 F.2d 881, 883–84 (2d Cir. 1971), and *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir. 1979). Those cases suggest that a "blatantly evasive" witness can obstruct justice. *Cohn*, 452 F.2d at 884. But neither case tied

its analysis to the actual text or history of the obstruction statute, and neither case addressed the constitutional problems raised by *Poindexter* and *Aguilar*. Even more to the point, in both *Cohn* and *Griffin*, the witness's testimony was factually false as well as "evasive." In both *Cohn* and *Griffin*, the defendant had *falsely* denied knowledge of events under investigation. *See Griffin*, 589 F.2d at 204 ("Whether Griffin's testimony is described in the indictment as 'evasive' because he deliberately concealed knowledge or 'false' because he blocked the flow of truthful information is immaterial.").

Neither *Cohn* nor *Griffin* affirmed a conviction for truthful testimony. Neither *Cohn* nor *Griffin* held or even suggested that a witness could be convicted of obstruction for truthful testimony. Nor has this Court or any other court so held.

2. Due Process and Fair Warning

Text, history, and statutory structure aside, one simple fact is both undeniable and outcome-determinative: *no published decision of any federal court has ever affirmed a § 1503 conviction for truthful testimony*. Under the Due Process Clause and the fair warning requirement, that fact alone mandates reversal.

One of the most essential principles of criminal jurisprudence is that the scope of a criminal law may not be retroactively expanded. Under the fair warning requirement, which is derived from the Ex Post Facto Clause and the Due Process Clause, the law upon which any criminal prosecution is based must be clear at the

time of the defendant's conduct. "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

Simply put, it is impermissible for a court to make "a marked and unpredictable departure from prior precedent" that retroactively expands criminal liability. *Rogers v. Tennessee*, 532 U.S. 451, 467 (2001). Unforeseeable judicial enlargements are impermissible. *Poland v. Stewart*, 117 F.3d 1094, 1099 (9th Cir. 1997). If the Department of Justice would like to expand § 1503 to cover some truthful testimony, it may certainly lobby Congress for an amendment. But whatever the policy merits of such an expansion, it cannot be enacted by this Court and applied retroactively to Mr. Bonds's conduct. *See United States v. Potts*, 528 F.2d 883, 886 (9th Cir. 1975) (en banc).

In order to rule in the government's favor, this Court would have to *first* resolve the constitutional question left open by *Aguilar*, and *second* expand the statute to the entirely new territory of "truthful but unresponsive" testimony. By contrast, to rule for Mr. Bonds, this Court need only accept the much narrower proposition that it lacks the authority to retroactively expand the scope of § 1503. At the time of Mr. Bonds's grand jury testimony, neither the text of § 1503 nor the cases interpreting that provision provided fair warning that truthful testimony in a

grand jury proceeding could constitute a crime. Nor did the prosecutor's admonition to Mr. Bonds, or his immunity agreement, provide any warning that he could be prosecuted for rambling. For those reasons alone, his conviction must be reversed.

3. Contempt and Obstruction Compared

The government argued below that Mr. Bonds's "celebrity child" statement was equivalent to a refusal to answer the prosecutor's question. Even if that characterization were plausible, a refusal to answer a question constitutes contempt under 18 U.S.C. § 401, not obstruction under § 1503. Both statutes serve distinct purposes.

As described above, § 401 is the modern recodification of Section 1 of the 1831 Contempt Act, while § 1503 is the modern recodification of Section 2 of the 1831 Contempt Act. The former was aimed at in-court misconduct, including refusal to follow lawful court orders of the court, while the latter was aimed at out-of-court misconduct, including attempts to threaten or bribe witnesses or jurors. *Essex*, 407 F.2d at 217 ("Sections 1 and 2 of the Act of March 2, 1831 are now part of our present statutory scheme as 18 U.S.C. § 401, which condemns obstructive acts *in the court's presence*, and 18 U.S.C. § 1503, which prohibits contemptuous conduct *away from court*, respectively.") (emphasis added). There is no question that a persistent refusal to answer questions during grand jury proceedings is

against the law. But the law that such conduct violates is § 401. There is no need to extend § 1503 to conduct already covered by actual contempt provisions.

If, in 2003, the prosecution truly believed that Mr. Bonds was refusing to answer the questions it posed during grand jury proceedings, it should have instituted contempt proceedings under § 401. But of course, at the time, the prosecution believed no such thing: as it stated before the grand jury, Mr. Bonds did indeed readily "cover" the subject of whether Anderson had given him anything to inject himself with. The government only invented its "refusal to answer" theory of guilt years later when it became apparent that its primary theory of guilt had fallen apart.

C. Conclusion

The government's belatedly invented fallback theory is legally invalid under § 1503. Even if prior judicial expansions of the statute are valid, the statute cannot be extended further to reach truthful but unresponsive statements. In its brief on appeal, the government will not be able to cite any authority for the proposition that truthful statements can constitute obstruction of justice. That fact alone controls the outcome of this appeal.

II. THE CONVICTION MUST BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT STATEMENT C WAS UNRESPONSIVE, INTENTIONALLY OBSTRUCTIVE, AND MATERIAL

The analysis in Argument I above demonstrates two general legal propositions. First, if ordinary methods of statutory interpretation—including examination of the text and history of the statute, as well as application of interpretive canons and the rule of lenity—were applied to § 1503, that statute would not cover a witness's own testimony at all. Second, even if false testimony is proscribed by § 1503, the statute cannot be expanded to criminalize truthful testimony merely because it does not respond directly to a prosecutor's questions.

But even if this Court disagrees with both general legal propositions, it must nonetheless reverse Mr. Bonds's conviction. Even if nonresponsive testimony may constitute obstruction *in some cases*, it did not constitute obstruction *in this case* for two additional reasons. *First*, Mr. Bonds's "celebrity child" remark was not evasive, especially given that he repeatedly and directly answered the same question when it was repeated by prosecutors, as the law requires. The government's claim that Mr. Bonds "refused to answer" the question is flatly contradicted by the evidence. *Second*, Mr. Bonds's "celebrity child" remark was utterly irrelevant to the proceedings, and thus cannot have been material, which is an essential element of the offense.

Indeed, the government is stuck in a logical trap. In order to show that Mr. Bonds's testimony was "evasive," it must argue that his answer in Statement C was irrelevant to the question previously asked. But once it makes the argument for irrelevance, it has also conceded immateriality. The government cannot argue that Mr. Bonds's testimony was, simultaneously, both criminally digressive and legally material. Thus, even drawing all reasonable inferences in favor of the jury's verdict, the evidence was insufficient to establish that Mr. Bonds intentionally obstructed justice when he made his "celebrity child" remark.[14]

A. Statement C Cannot Be Characterized as a Refusal to Answer a Question

1. Statement C Testimony and Other Answers

Viewed in context, Mr. Bonds's testimony in Statement C cannot be characterized as unresponsive, much less a "refusal to answer." As described in the Statement of Facts above, prosecutors asked Mr. Bonds whether Greg Anderson gave him anything that required a syringe to inject himself. Mr. Bonds responded: "I've only had one doctor touch me. And that's my only personal doctor." That statement, while not a simple 'yes' or 'no' answer, was responsive. Any competent English speaker would understand Mr. Bonds's initial statement as answering the question in the negative.

[14] Challenges to the sufficiency of evidence are reviewed de novo. *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

Mr. Bonds then began to talk generally about the nature of his relationship with Mr. Anderson. Not only did the prosecutor not interrupt Mr. Bonds and attempt to get him back on track, he actually interjected and said, "Right," encouraging Mr. Bonds to keep talking. So Mr. Bonds did keep talking, continuing to talk about his father, being a "celebrity child," and his wife. At the time he made Statement C, *there was not even a question pending*. It may be true that Statement C did not respond to the earlier self-injection question, but by the time he made the "celebrity child" remark, Mr. Bonds already had responded to that previous question and had moved on to other topics.

The government did not charge Mr. Bonds's initial answer to the prosecutor's question about self-injection—"I've only had one doctor touch me"—as obstruction of justice. The government therefore effectively conceded that the statement was sufficiently responsive so as not to be evasive. That being so, what Mr. Bonds said after the prosecutor's interjection of "Right"—i.e., the "celebrity child" comment in Statement C—was not evasive because there was no question pending. Mr. Bonds was no more guilty of obstruction than he would have been if, having answered one prosecutorial question, he chatted with grand jurors about the weather while the prosecutor was formulating his next one.

Moreover, following that initial exchange, the prosecutors repeatedly asked Mr. Bonds the same essential question. They asked whether Anderson or Conte

had ever given him injectable liquids; they asked whether anyone other than a doctor had injected him with anything; they asked whether he had injected himself with anything. Each time, Mr. Bonds answered no. Finally, admitting that they had already "covered this," the prosecutors asked again whether Anderson gave him any injectable steroids, and Mr. Bonds again said no. By the prosecutor's own admission, the same topic had been "covered"—repeatedly—throughout the grand jury proceedings.

2. The Government's Burden

Even viewing the evidence in the light most favorable to the verdict, the testimony in Statement C did not violate § 1503. As a matter of law, that testimony must be examined in context—both in the context of the questions and statements immediately surrounding Statement C, and also in the context of the entire proceedings. *United States v. Serafini*, 167 F.3d 812, 820-21 (3d Cir. 1999); *Van Liew v. United States*, 321 F.2d 674, 678 (5th Cir. 1963). Viewed in context, Mr. Bonds's "celebrity child" remark did not constitute a crime.

Prosecutors have a legal obligation to clarify unresponsive testimony. As the Supreme Court held in its seminal decision in *Bronston v. United States*, "[t]he burden is on the questioner to pin the witness down to the specific object to the questioner's inquiry." 409 U.S. 352, 360 (1973). "[T]he examiner's awareness of unresponsiveness should lead him to press another question or reframe his initial

question with greater precision." *Id*. at 362; *accord United States v. Sainz*, 772 F.2d 559, 564 (9th Cir. 1985). If a witness, for whatever reason, fails to directly answer a question in the first instance, the prosecutor must ask again. The witness's failure—if only temporary—cannot be a crime.

The district court erred in holding that the fact that the "defendant later answered the specific question regarding *self* injection truthfully [was] not dispositive." (ER 14 [Rule 29 Order]; emphasis in original.) It concluded that because defendant's responses "resulted in the prosecutors asking clarifying question after clarifying question," Mr. Bonds had obstructed the proceeding. (*Id*.) Under *Bronston*, that ruling is flatly erroneous. It is also extraordinarily dangerous. Under the district court's logic, the government could convert the legal duty imposed on it under *Bronston*—to repeat questions to which it receives unresponsive answers—into a mechanism by which to convict witnesses who testify in good faith. The government's repeated questions themselves would become proof of obstruction. Here, for example, the government repeated its question regarding self-injection *even after it conceded Mr. Bonds had answered it*. The specter of governmental capriciousness and oppression under such a rule looms large.

The government will no doubt argue that Mr. Bonds's *other* answers to the questions on self-injection were false. The government offered not a shred of

evidence that Mr. Bonds was ever given anything to self-inject, and, in any case, that was not the theory on which Mr. Bonds was charged and convicted. As noted, in upholding the conviction, the district court assumed that Mr. Bonds answered the other self-injection questions truthfully. (ER 14.)

More generally, the government will likely suggest that Mr. Bonds lied throughout the proceedings, and that he really was guilty of Counts One through Three. It will try to convince this Court that Mr. Bonds deserves to be convicted of *something*. But rambling about being a "celebrity child" was not a crime. It was not factually false. It was not a refusal to answer a question. And it did absolutely nothing to impede the function of the grand jury.

Finally, the claim that a single non-responsive answer by Mr. Bonds could constitute obstruction of justice is rendered absurd by the performance of the prosecution's own witnesses at trial. During the cross-examination of Agent Novitzky, the prosecution's chief investigator, he was asked what he had shown a witness at a meeting. Instead of answering that he had shown him a transcript, Novitzky went into a lengthy, obviously prejudicial description of the contents of an exhibit that the district court had yet to deem admissible. The court struck Novitzky's answer as nonresponsive and instructed him to answer only the question that had been asked. (ER 183-85.) On multiple occasions during the cross-examination of Kim Bell, Mr. Bonds's former girlfriend, the court struck

Bell's answers as nonresponsive and/or directed her to answer the questions she had been asked. (ER 175-77; ER 181.) Nonetheless, when asked whether she had spoken about Mr. Bonds in a vulgar way in her media interviews, Bell simply refused to answer the question, despite its being asked at least four times. (ER 180.) The government would never contend that Ms. Bell and Mr. Novitzky were guilty of obstruction during their trial testimony; likewise, Mr. Bonds certainly was not when he spoke of being a "celebrity's child."

B. Statement C Was Not Material

Even if Mr. Bonds's "celebrity child" remark could be plausibly characterized as nonresponsive, that testimony cannot constitute obstruction under § 1503 because it was not material.

Materiality is an element of the crime of obstruction. *Thomas*, 612 F.3d at 1128-29. As the Supreme Court has said, a defendant's conduct must have "the 'natural and probable effect' of interfering with the due administration of justice." *Aguilar*, 515 U.S. at 601. In *Aguilar*, the Supreme Court held that a false statement to a government investigator was not a crime under § 1503. Even though the defendant knew that grand jury proceedings were pending, he did not know whether the investigator would testify, so he could not have known that his false statement was "likely to obstruct justice." *Id.* He was therefore acquitted.

Assuming *arguendo* that Mr. Bonds's "celebrity child" remark was nonresponsive, because it did not answer the question previously asked by prosecutors, it was not material. Contrary to the district court's conclusion,[15] a single unresponsive answer, coupled with repeated direct responsive answers to the same question, cannot possibly have any tendency to impede the grand jury.

The government's argument for materiality is internally contradictory. Statement C was true—the government cannot possibly contend otherwise, and did not do so at trial. (ER 69; see also ER 12 n.5 [Rule 29 Order]; ER 165.1.) That truthful statement was either relevant or irrelevant to the grand jury proceedings. If it was irrelevant, then it cannot be material because statements that have nothing to do with the matter under investigation cannot impede the course of that investigation. Logically, a statement cannot be irrelevant and material at the same time.

If, on the other hand, Statement C was somehow relevant to the grand jury's investigation, then it still cannot constitute obstruction. If Statement C was both truthful and relevant to the question posed, then as a matter of logic and common sense, it could not also be evasive. Thus, whether viewed as relevant or irrelevant to the proceedings, Statement C cannot constitute an obstruction of justice.

[15] See ER 14 (Rule 29 Order): "An evasive answer about an issue material to the grand jury is not necessarily rendered immaterial by the later provision of a direct answer, even if that direct answer is true."

In rejecting Mr. Bonds's arguments for acquittal for lack of materiality, the district court shifted focus from the testimony itself to the question asked by prosecutors.

> Viewed in the light most favorable to the government, the record supports a finding, beyond a reasonable doubt, that the *question* was material to the grand jury's investigation of BALCO and Greg Anderson for unlawfully distributing performance enhancing drugs, and that defendant endeavored to obstruct the grand jury by not answering it when it was first asked.

(ER 14 [Rule 29 Order] [emphasis added].) That artful reframing does not withstand scrutiny. First, the case law is clear that the focus of the § 1503 inquiry is the words and intent of the defendant, not the prosecutor. *Aguilar*, 515 U.S. at 601. As the district court's own instructions to the jury stated, it is the defendant's testimony—not merely the prosecutor's question—that must meet the standard of materiality. (ER 157.) *See also Thomas*, 612 F.3d at 1129 (holding that § 1503 requires "material false statements") (emphasis removed).

Second, even assuming that the examination of materiality could focus principally on the question itself rather than the charged statement, then at a minimum, the examination of the defendant's supposed endeavor to obstruct must focus on his entire answer to that question. Mr. Bonds's initial answer to the prosecutor's previous question was that he had only had one doctor touch him—an implicit negative response to the prosecutor's question—and yet the district court

refused to consider that answer at all. The district court simultaneously *broadened* the factual context to include the materiality of the prosecutor's question and *narrowed* the factual context to exclude not only Mr. Bonds's other answers to the same question but also his actual initial answer to the question.

The government cannot have it both ways. Statement C was simply one part of a lengthy piece of testimony made after the prosecutor's inquiry about whether Anderson ever gave Mr. Bonds's injectable steroids. It is impermissible for the government to pluck that statement out of context and call it nonresponsive while simultaneously using the broader context to establish materiality. If viewed solely in isolation, Statement C is not remotely material. If viewed in a broader context, Statement C was neither unresponsive nor material.

Having failed to prove that Mr. Bonds lied under oath, the government should not be able to convict him of a federal crime for digressing into irrelevant matters about his childhood. The text, history, and structure of § 1503 do not support applying that statute to Mr. Bonds's conduct, and there is no case law that supports such a result. In truth, extending § 1503 to cover this case would be a perversion of the statute's original purpose. And even ignoring all of the fundamental problems with the government's legal theory about the scope of the obstruction statute, the government's factual arguments that Statement C was both

unresponsive and also material lack merit, in part because they are internally contradictory.

Drawing all reasonable inferences in the government's favor, and even assuming that truthful statements can be obstructive in some cases, the evidence failed to establish beyond a reasonable doubt that Statement C constituted obstruction of justice. This Court must acquit on Count Five.

III. THE INDICTMENT ON COUNT FIVE WAS DEFICIENT BECAUSE IT FAILED TO PROVIDE NOTICE OF THE ALLEGED OFFENSE, AND THE DISTRICT COURT'S INSTRUCTIONS TO THE PETIT JURY CONSTITUTED A CONSTRUCTIVE AMENDMENT

The petit jury convicted Mr. Bonds on the theory that his "celebrity child" statement, while true, was obstructive because it was unresponsive to the prosecutor's question. For the reasons given in Arguments I and II, that theory is legally invalid, and Mr. Bonds must be acquitted. But even assuming the validity of that legal theory, the conviction cannot be sustained because that theory was not alleged in the indictment, and probable cause to support the government's trial theory was not found by the grand jury. Indeed, the indictment did not mention Statement C *at all*.[16] The Constitution does not permit such an omission.[17]

[16] The sufficiency of an indictment is reviewed de novo. *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011). Prior to trial, Mr. Bonds moved to dismiss the obstruction count as deficiently pleaded. (Dkt. 194 [motion to dismiss or strike].) Mr. Bonds also objected to the jury instructions on the grounds that they constituted a constructive amendment of the indictment. (ER 45-49; ER 162-63.)

A. Procedural Background

1. Count Five As Alleged in the Indictment

The § 1503 obstruction charge in Count Five of the third superseding indictment was described as follows:

> COUNT FIVE: (18 U.S.C. §1503 - Obstruction of Justice)
>
> 18. The factual allegations contained in paragraphs one through nine above are incorporated herein as if set forth in full.
>
> 19. 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.

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[17] The issue of whether a defendant can be convicted of obstructing a grand jury based on statements which are not specified in the obstruction charge is a question of first impression in this Circuit. It was argued, but not decided, in *Thomas*, 612 F.3d 1107. There, as here, the defendant was charged with obstruction in a count that alleged specific statements she made before the grand jury but stated the charge was "not limited" to those specific statements. This Court noted that, as demonstrated in the jury's special verdicts, Ms. Thomas was convicted on the obstruction charge based on two statements clearly detailed in her indictment. Thus, the "not limited' language of the indictment, and the insertion into the obstruction charge of statements not specified in the indictment, simply did not matter in *Thomas*, and that opinion did not decide their legality.

(ER 198.) Mr. Bonds's testimony in Statement C was not mentioned in the description of Count Five, nor was it mentioned at any other point in the indictment.

Throughout the proceedings below, Mr. Bonds repeatedly challenged the sufficiency of the § 1503 allegations and pressed the government for an actual description of its theory of the obstruction offense. But although the government superseded three times over the course of four years of pretrial proceedings, it refused to limit the § 1503 charge to the statements specifically referred to in the obstruction count. At one point, in a filing in response to a motion to dismiss the count, the government gave the following description of its legal theory:

> Accordingly, the essence of that count is Bonds's repetition of false statements, coupled with his evasive testimony in response to other questions posed by the prosecutor. In other words, *this count rests on Bonds's grand jury testimony as a whole, not on individual questions and answers*.

(ER 230 [emphasis added].)

2. Count Five as Presented at Trial

Thus, the government's stated legal theory was based on Mr. Bonds's "testimony as a whole," rather than any individual answer. Prior to trial, however, it submitted jury instructions that listed particular portions of testimony—including the false statement counts and several other uncharged statements.

Ultimately, the petit jury was presented with seven discrete statements on which it could convict. The petit jury was instructed as follows:

> 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:

The instructions then listed the three statements charged as Counts One through Three, and four additional statements, labeled Statement A through Statement D. (ER 157-59.) The jury convicted Mr. Bonds based on Statement C, the "celebrity child" remark.

B. The Requirements of the Grand Jury Clause

The Fifth Amendment guarantees that a defendant may not be held to answer for federal criminal charges unless he is indicted by a grand jury. As an institution, the grand jury has existed in Anglo-American law for over 800 years. *See United States v. Navarro-Vargas*, 408 F.3d 1184, 1190-92 (9th Cir. 2005) (en banc). At the time of the Founding, the grand jury was viewed as a critical check on executive power and oppressive prosecutions. As Chief Justice Warren explained a half century ago,

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of

> standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Wood v. Georgia, 370 U.S. 375, 390 (1962); *see also Ex parte Bain*, 121 U.S. 1, 11 (1887) (stating that the grand jury was designed "as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity") (internal quotation marks omitted).

The grand jury right has several doctrinal manifestations, two of which are particularly at issue in this case. First, the Grand Jury Clause requires clear notice. It requires an indictment that "fairly informs a defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also United States v. Hartz*, 458 F.3d 1011, 1022 (9th Cir. 2006) ("The grand jury clause of the Fifth Amendment is designed to ensure that criminal defendants have fair notice of the charges that they will face and the theories that the government will present at trial.").

Second, the Grand Jury Clause forbids post-indictment amendment of the charges. The 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). The petit jury may only convict a defendant of the essential crime alleged by the grand jury, and a district court "may not substantially amend

the indictment through its instructions to the jury." *United States v. Shipsey*, 190 F.3d 1081, 1086 (9th Cir. 1999) (internal quotation marks omitted).

For decades, this Court has rigorously enforced these doctrines to ensure the "basic protection that the grand jury was designed to secure." *United States v. Cecil*, 608 F.2d 1294, 1297 (9th Cir. 1979) (quoting *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979)). In this case, the government utterly failed to abide by the requirements of the Grand Jury Clause. In fact, the meandering and misguided prosecution in this case once again demonstrates the critical constitutional role of the grand jury.

C. Inadequate Notice

An indictment must provide notice to a defendant of the facts and circumstances constituting the alleged offense. Especially when alleging a violation of a statute worded in general terms, it is not sufficient for an indictment to simply recite the language of the statute. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling*, 418 U.S. at 117-18 (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)); *see also United States v. Bobo*, 344 F.3d 1076, 1083-85 (11th Cir. 2003) (reversing a fraud conviction where the indictment alleged the

statutory language but failed to describe the manner and means of the scheme). The Fifth Amendment's standard of notice is substantially incorporated in Fed. R. Crim. P. 7(c), which states that an indictment must contain "definite written statement of the essential facts constituting the offense charged." Moreover, deficiencies in the notice provided by an indictment cannot be cured by other means, such as a bill of particulars. *United States v. Fleming*, 215 F.3d 930, 934-35 (9th Cir. 2000); *United States v. ORS, Inc.*, 997 F.2d 628, 631 n.5 (9th Cir. 1993).

The indictment in this case failed to meet that standard. Other than re-alleging the four separately charged false statements, Count Five gave no description of the essential facts constituting the offense. It did not describe which other portions of Mr. Bonds's testimony were obstructive. It did not describe how any of the defendant's statements were material to the grand jury's investigation. It thus failed to inform Mr. Bonds of the nature of the charges against him. A vague allegation that "your entire testimony was obstructive" does not state an offense under § 1503 and does not sufficiently apprise a criminal defendant of the charges against him.

The district court ruled, however, that rather than inform the defendant of the specific "evasive false, and misleading" statements he was accused of making before the grand jury, the indictment could simply inform him that those

statements were located somewhere among the hundreds contained in the grand jury transcript. (*See* ER 15-16 [Rule 29 Order]: "It is clear from the language of the indictment, as well as from the manner in which the government has proceeded prosecuting this case, that defendant was at risk of being convicted of obstruction of justice on the basis of any and all statements that he made to the grand jury that were evasive, false, or misleading.")

The Supreme Court's decision in *Russell* makes obvious the lower court's error. The Court held insufficient an indictment charging a violation of a federal statute which makes it a crime for a witness to refuse to answer before a Congressional Committee "any question pertinent to the [subject] under inquiry." *Russell v. United States*, 369 U.S. 749, 751 n.2 (1962). The indictment was held to be defective because it failed to specifically identify the subject of the committee's inquiry, which had to be known in order to determine whether the questions asked met the statutory requirement of pertinence. In condemning the indictment before it, the Supreme Court observed that:

> A cryptic form of the indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.

Id. at 766.

The *Russell* Court found that the defendant "was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing [the defendant] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Id.* at 768. The Supreme Court noted that such an imprecise indictment failed "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." *Id.* Here, the government did just what *Russell* condemns: it used the ambiguous language of Count Five to constantly shift its theory of obstruction before and during trial.[18]

Reading the generic language of the indictment, there was no way that Mr. Bonds could have known that he would ultimately have to defend himself against an allegation that his rambling about being a "celebrity child" obstructed the grand jury. For that reason alone, the indictment was insufficient under both the Constitution and the Federal Rules of Criminal Procedure.

[18]At one point prior to trial, the government submitted instructions to the district court listing twelve uncharged statements as the basis for the obstruction charge (ER 208-14), later reducing to that number to seven (ER186.3-89), of which the district court submitted four to the jury. (ER 157-59.)

D. Constructive Amendment

Notice aside, to the extent that the indictment did allege anything resembling a concrete theory of the crime, it was not the same theory on which the jury returned a guilty verdict. The prosecution may not present one theory of guilt to the grand jury and another to the petit jury. *Stirone*, 361 U.S. at 217; *see also United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9th Cir. 1997) ("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.").

At various points in the proceedings below, the government argued several different theories of the Count Five obstruction charge. Of course, the government's primary theory—the theory on which it no doubt expected to obtain a conviction—was that the individually charged false statements also constituted obstruction. But the government also presented two different fallback theories.

In the first fallback theory, Mr. Bonds was guilty because his testimony as a whole was, in a general way, false, misleading, and evasive, and therefore he obstructed the grand jury. In its response to Mr. Bonds's motion to dismiss, the government stated: "this count rests on Bonds's grand jury testimony as a whole, not on individual questions and answers." In the second fallback theory, Mr. Bonds was guilty because several of his other statements during his testimony, though not necessarily false, were obstructive as not sufficiently responsive. The

jury refused to convict on the government's primary theory of obstruction—that Mr. Bonds lied to the grand jury. So the government obtained a conviction on Count Five only by resort to its second fallback theory—that Mr. Bonds's "celebrity child" statement, though true, was obstructive by virtue of being nonresponsive.

That theory, however, was never presented to the grand jury. "Nowhere in the indictment is there a statement of facts and circumstances that would support [the] other possible . . . theor[y]" that was ultimately presented at trial. *Shipsey*, 190 F.3d at 1087. Even assuming that the giving of the irrelevant but truthful Statement C to the grand jury was a legally valid theory of obstruction under § 1503—which it is not—the simple point is that the indictment did not allege that theory. *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (reversing where "indictment fail[ed] to ensure that he was prosecuted only on the basis of the facts presented to the grand jury"). There is no indication that the grand jury ever considered Statement C, much less found probable cause that it was evasive, material, and intentionally obstructive.

The indictment in this case gave no warning that Mr. Bonds would have to rebut allegations that his "celebrity child" remark was evasive and therefore obstructive, and Mr. Bonds was ultimately "convicted on a charge the grand jury

never made against him." *Stirone*, 361 U.S. at 219. His conviction must therefore be reversed.

IV. THE CONVICTION MUST BE REVERSED DUE TO INSTRUCTIONAL ERROR

Finally, the district court erred by refusing to give the "totality" instruction proposed by the defense.[19] As discussed above, the government's response to the defense claim that the obstruction count could only rest on a statement expressly identified in the indictment was "this count rests on Bonds's grand jury testimony as a whole, not on individual questions and answers." (ER 230.)

Prior to trial, when the defendant challenged the obstruction count, the government responded with the statement "that the factual basis in support of Count [Five] consists of the *totality* of Bond's intentionally evasive, false and misleading conduct during her [sic] testimony." (ER 202 [emphasis added].) The government thus initially avoided dismissal of the obstruction count by claiming that the offense charged a crime involving the whole of Bonds's testimony rather than any specific part. Under the government's own theory, permitting the obstruction conviction to rest on anything other than the totality of Mr. Bonds's testimony would constitute a constructive amendment of the indictment.

[19] A claim that the instructions did not cover the theory of the defense is reviewed de novo. *United States v. Tucker*, 641 F.3d 1110, 1122 (9th Cir. 2011).

For that reason, the jury had to be instructed, as Bonds requested, that to convict of obstruction on the basis of Statement C, jurors had to find the defendant had given the grand jury "material testimony that, *when considered in its totality*, was intentionally evasive, false, and misleading." (ER 162-65 [emphasis added].) The defense requested the "totality" language precisely to ensure that the jury did not convict based on an isolated answer if the totality of Mr. Bond's testimony demonstrated that he was not intending to be obstructive. (ER 163.) The "totality" phrase, which the government had previously agreed correctly characterized the obstruction charge, would have informed the jury that a single evasive statement was not sufficient to convict, thereby requiring jurors to consider the other responses given by Mr. Bonds on the subject of injectable substances.

Moreover, even setting aside the shifting sands of the government's arguments below, Mr. Bonds's proposed instruction was correct as a matter of law. Case law requires that juries examine particular statements in the context of the entire testimony. As with perjury, a charge of obstruction may not be obtained by the device of "lifting a statement" out of its context. *Serafini*, 167 F.3d at 820. Legally, a purportedly obstructive statement must be examined in the context of the entire testimony, and in this case, one of the primary theories of the defense was that throughout his testimony, Mr. Bonds cooperated, answered questions, and gave helpful information. "A defendant is entitled to have the judge instruct the

jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence." *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990). Mr. Bonds's proposed instruction met that standard.

The failure to instruct on the "totality" concept likely led to a flawed verdict, yet another reason the Count Five conviction should be set aside.

CONCLUSION

In a recent en banc opinion, this Court rejected an interpretation of the Computer Fraud Protection Act that would have criminalized use of computers in violation of the policies of employers or websites. In warning of the dangers of reading criminal statutes so broadly that virtually anyone could be subject to their application, Chief Judge Kozinski took note of *United States* v. *Kozminski*, 487 U.S. 931 (1988), where

> the Supreme Court refused to adopt the government's broad interpretation of a statute because it would "criminalize a broad range of day-to-day activity." Applying the rule of lenity, the Court warned that the broader statutory interpretation would "delegate to prosecutors and juries the inherently legislative task of determining what type of . . . activities are so morally reprehensible that they should be punished as crimes" and would "subject individuals to the risk of arbitrary or discriminatory prosecution and conviction."

United States v. Nosal, -- F.3d --, 2012 WL 1176119 at *6 (9th Cir. April 10, 2012) (en banc).

This case demonstrates that the government's reading of the obstruction statute—an interpretation that would criminalize instances of truthful testimony in

virtually any given case—resulted here in an "arbitrary or discriminatory prosecution and conviction." Ironically, this type of overreaching prosecution is exactly what both the obstruction statute and the Grand Jury Clause were originally designed to prevent. Mr. Bonds's conviction on Count Five should be reversed, and the charge dismissed. Alternatively, a new trial should be ordered.

Dated: May 3, 2012

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

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 13,488 words.

Dated: May 3, 2012

/s/ Donald M. Horgan
DONALD M. HORGAN

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