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15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**

18 UNITED STATES OF AMERICA, ) Case No. CR 07 0732 SI  
19 Plaintiff, )  
20 vs. ) **DEFENDANT’S MOTION TO DISMISS**  
 ) **OR STRIKE LANGUAGE FROM**  
 ) **COUNT ELEVEN AND SUPPORTING**  
21 BARRY LAMAR BONDS, ) **MEMORANDUM**  
 )  
22 Defendant. ) Date: February 11, 2011  
 ) Time: 11 a.m.  
 ) Judge: The Honorable Susan Illston  
23

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28 **Defendant’s Motion to Dismiss or**  
**Strike Language from Count Eleven**

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18 U.S.C. section 1623(a)	1
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**MISCELLANEOUS**

1A Charles A. Wright, <i>Federal Practice and Procedure</i> § 142 (3d ed. 2007)	12
1 Wright, <i>Federal Practice and Procedure</i> § 142 (2nd ed. 1982)	12
8 <i>Moore's Federal Practice</i> § 8.03 (2nd ed. 1984)	12

**INTRODUCTION AND STATEMENT OF THE CASE**

1  
2 This motion presents the Court with an issue similar to one raised, but not resolved, in the  
3 Tammy Thomas prosecution. *United States v. Thomas*, 612 F.3d 1107 (9th Cir. 2010),

4 In *Thomas*, as in this case, the defendant was charged with a count of obstructing the due  
5 administration of justice — Count Six in *Thomas*, and Count Eleven here. In both cases, the  
6 obstruction count alleged that the defendant had given the Grand Jury “testimony that was  
7 intentionally evasive, false, and misleading...” In both cases, the obstruction count rested on the  
8 allegedly false statements also charged as substantive offenses under 18 U.S.C. section 1623(a)  
9 — in *Thomas*, Counts One to Five, here Counts One to Ten. And in both cases, the obstruction  
10 count additionally alleged that the “intentionally evasive, false, and misleading” testimony  
11 “included but [was] not limited to the false statements” charged in the section 1623(a) counts.  
12 (See Bonds Superseding Indictment, at page 10; *Thomas*, at 1129.)

13 The “not limited” phrase raised in *Thomas*, and raises here, a number of thorny legal  
14 questions. How can an accused defend against the allegation that she or he gave “intentionally  
15 evasive, false, and misleading” testimony when her or his indictment gives no notice of what  
16 “testimony” an obstruction charge puts in issue? How can a defendant be assured of the  
17 protection of her or his right to a unanimous verdict absent specification of the factual bases for  
18 conviction? And how can a defendant’s right to be convicted based only on a factual theory  
19 approved by the grand jury be honored when an indictment contains no indication of what  
20 testimony grand jurors relied on in framing the “not limited” language of an obstruction charge?  
21 . *Stirone v. United States*, 361 U.S. 212 (1960) (The government may not rely on one factual  
22 theory to obtain an indictment and another to obtain a conviction)

23 This Court was troubled by the lack of specificity in the obstruction count in *Thomas*, and  
24 took steps to remedy some of its ills, as described in the Ninth Circuit’s opinion:

25 At trial, Thomas objected to the charging language of count six as  
26 overbroad, and the district court asked the government to explain  
27 its theory of obstruction. The government responded that, in  
28 addition to the five alleged false statements expressed in counts  
one through five, there “was a pattern of evasive and misleading  
conduct throughout [defendant’s] testimony.” However, to “cure  
some of the court’s concerns,” the government agreed to “specify ...

1 a few specific instances in which the defendant testified evasively,  
 2 or false [sic], or in a misleading way above and beyond the false  
 3 statements.” After Thomas rested, the government submitted new  
 4 instructions and a new verdict form narrowing Thomas's alleged  
 obstructive conduct from her entire grand jury testimony to the five  
 specific allegations already pleaded in the indictment and four  
 specific instances of “evasive, false, misleading conduct.”

5 612 F.3d 1129-30.

6 The jury returned a special verdict finding Thomas guilty of obstruction based on four  
 7 portions of her testimony — two of which had been charged as substantive section 1623 offenses  
 8 in counts One and Three, and two of which had not been specified in the indictment but which  
 9 were included in the instructions as “specific instances of ‘evasive, false, misleading conduct.’”

10 *Id.*

11 No doubt anticipating a challenge to the obstruction count similar to that raised at the  
 12 *Thomas* trial, the government has submitted jury instructions in this matter listing as the possible  
 13 bases for conviction on the Count Eleven obstruction count both the statements charged as  
 14 section 1623 violations in Counts One to Ten, and twelve other portions of Mr. Bonds’ grand  
 15 jury testimony that were not specified in the indictment. It cannot be said that these twelve  
 16 portions of the grand jury each contain a single allegedly evasive, false, or misleading statement,  
 17 because many of the twelve contain multiple questions and answers. They are as follows:

18 Statement A

19 Q: Now, had you said during that conversation that you - - or had you denied  
 20 ever taking steroids, now, with what you’ve seen today, do you feel comfortable  
 as you sit here today saying that you have never taken steroids?

21 A: I feel very comfortable, very comfortable.

22 Statement B

23 Q: But is it your testimony that the “G” and the “test” don’t reference anything  
 that you were taking from Mr. Anderson?

24 A: This just doesn’t seem right. I don’t know what this is. I’ve never seen this, and  
 25 it’s just odd. There’s – I mean, for anybody who’s here that has some kind of  
 recollection of steroids, I mean, this would be an odd way of doing things, I would  
 believe.

26 Q: Why?

27 A: Just from my own thinking, you know, they go in cycles, don’t they? And  
 everyone stays on a normal – this doesn’t seem – this seems really odd and  
 irregular to me.

28 Q: Okay. Well, there are, of course, days where it’s indicated that one is to be  
 taking it and then days with Xs through them which are presumably off days;

1 right?

2 A: Yeah, I mean, I'm not overly naïve, but I don't think you would do something  
3 and then – I mean, aren't you supposed to do this every day or every other day and  
4 every once a week or something like this? And you go through a cycle thing? This  
5 is too irregular. It just seems odd to me. That's all I'm saying, it just seems real  
6 odd.

7 Q: Can you tell of any reason why Greg would have written "G" or "test" and  
8 things like that on a calendar with you [sic] initials on it if he wasn't giving you  
9 growth hormone and testosterone?

10 A: I can't answer that. Maybe he ran out of paper. I don't know.

11 Q: I'm sorry. I didn't - - I'm not sure I understood your answer.

12 A: I said I don't know why. I don't know why.

13  
14  
15 Statement C

16 Q: Let me move on to a different topic. And I think you've testified to this. But  
17 I want to make sure it's crystal clear. Every time you got the flax seed oil and the  
18 cream, did you get it in person from Greg?

19 A: Yes.

20 Q: Is that fair?

21 A: Yes.

22 Q: And where would you typically get it? Where would you guys be when  
23 he would hand it to you generally?

24 A In front of my locker, sitting in my chair.

25 Q: Did he ever come to your home and give it to you?

26 A: Oh, no, no, no. It was always at the ballpark.

27  
28 Statement D

29 Q: Did he tell you what he was going to test them for?

30 A: I believe it was the same thing for the blood, the blood and the thing are the  
31 exact same thing. So, I didn't ask him.

32 Q: I'm not asking what you believed or what you asked him. I'm asking what he  
33 told you. Did he tell you –

34 A: I can't recall, I cannot recall.

35 Q: So you don't know whether or not he mentioned what –

36 A: I cannot recall specifics, no, not at all.

37  
38 Statement E

39 Q: ...Do you remember how often he recommended to you about, approximately, that  
40 you take this cream, this lotion?

41 A: I can't recall. I don't – I wish I could. I just can't . . . I just know it wasn't often. I just  
42 think it was more when I was exhausted or tired than like a regular regimen. You know, it  
43 was like if I was really sore or something, really tired...that's – that's --- that's all I can  
44 remember about that.

45 Q: ... would you say it was more or less often or about the same as the amount of times  
46 you took the liquid, the flax seed oil, the thing you understood to be flax seed oil?

47 A: I don't know. I never kept track of that stuff. I'm sorry. I didn't sit there and  
48 monitor that stuff.

49  
50 Statement F

51 Q: Did Greg ever give you anything that required a syringe to inject yourself  
52 with?

1 A: I've only had one doctor touch me. And that's my only personal doctor.  
2 Greg, like I said, we don't get into each others' personal lives. We're friends, but I  
3 don't – we don't sit around and talk baseball, because he knows I don't want –  
4 don't come to my house talking baseball. If you want to come to my house and  
5 talk about fishing, some other stuff, we'll be good friends, you come around  
6 talking about baseball, you go on. I don't talk about his  
7 business. You know what I mean? ...

Q: Right.

5 A: That's what keeps our friendship. You know, I am sorry, but that – you know,  
6 that – I was a celebrity child, not just in baseball by my own instincts. I became a  
7 celebrity child with a famous father. I just don't get into other people's business  
8 because of my father's situation, you see...

7 Statement G

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

9 A: No.

10 Q: Would you have taken it if he gave it to you?

11 A: He wouldn't jeopardize our friendship that way.

12 Q: And why would that – you're very clear that that would jeopardize your  
13 friendship. Why would that jeopardize your friendship?

14 A: Greg is a good guy. You know, this kid is a great kid. He has a child.

15 Q: Mm-hmm.

16 A: Greg is – Greg has nothing, man. You know what I mean? Guy lives in his car  
17 half the time, he lives with his girlfriend, rents a room so he can be with his kid,  
18 you know? His ex takes his kid away from him every single five minutes. He's not  
19 that type of person. This is the same guy that goes over to our friend's mom's  
20 house and massages her leg because she has cancer and she swells up every night  
21 for months. Spends time next to my dad rubbing his feet every night. Our  
22 friendship is a little bit different.

17 Statement H

18 Q: Now, earlier this year, February of this year, do you recall – were you giving  
19 him blood samples at that time, say, in February of this year? Do you remember  
20 giving him blood samples or urine samples?

21 A: February back – I can't recall. I don't know.

22 Q: Okay.

23 A: I don't know. That's too far back for me to know.

24 Q: I'm talking about this year.

25 A: Talking February.

26 Q: February of this year.

27 A: It's December.

28 Q: Right. I understand.

A: I don't recall February – if I gave him blood in February.

24 Statement I

25 Q: Can you think of any reason why Victor Conte would be referring your urine  
26 sample to go out and get tested for steroids?

27 A: This doesn't have Barry Bonds's name on it. So, I'm not assuming that this is  
28 mine. That's what you just stated.

Q: Right.

A: Okay.

Q: Right.

1 A: This could be anybody's. Okay? So, that's not fair.  
2 Q: Well, we've discussed already, but let me re-clarify why I'm asking you that,  
because we do have this other document with –  
3 A: I see –  
4 Q: You understand... Can you think of any reason why Victor Conte would refer  
your urine to get tested for steroids?  
5 A: I have no idea.  
6 Q: Have you heard, before today, anyone suggest that your urine or blood samples  
were submitted or tested by BALCO Laboratories, Victor Conte, etc., for steroids?  
7 A: Was – was my urine test for – no.  
8 Q: This is the first you've heard of this suggestion?  
9 A: No. This is the first I've ever heard of this (indicating). I know that they sent  
samples out for people in the gym and things like that for testing of steroids and  
10 stuff like that. You know, and hospital tests. I mean, I know that.  
11 Q: Let me rephrase my question. My question is, have you ever heard about  
BALCO or Victor Conte submitting your urine or blood samples to test for  
12 steroids? Have you ever heard about that before?  
13 A: No, I – no, no, no.  
14 Q: From anyone?  
15 A: We had a test just this year for baseball, which everyone knows. It's a program.  
16 Supposed to be all anonymous.  
17 Q: Excuse me for interrupting Mr. Bonds.  
18 A: I'm just telling you.  
19 Q: My question is not about baseball. My question is about BALCO and Victor  
20 Conte.  
21 A: I don't talk to Victor Conte.  
22 Q: So, the answer is –  
23 A: No.  
24 Q: – this is the first you've ever heard of that suggestion?  
25 A: Of me, yes.

Statement J

17 Q: And you wouldn't talk about issues relating to steroids with him, would you?  
18 A: Like I said, I mean, if you want to talk about me, the players probably talk  
19 about it more than anybody. You know, your normal friends, everyday people, I  
20 mean, you bring it up in conversation. If you're talking about pushed on me or  
21 saying "you should," no.  
22 Q: My question goes back –  
23 A: Conversations, possibly, yes.  
24 Q: My question goes back to you and Mr. Anderson, not other players, not other  
25 people. Just conversations and contacts between yourself and Mr. Anderson.  
26 When [the prosecutor] asked you a while ago about that subject matter in relation  
27 to this investigation, you said "We didn't talk about any of that stuff," basically,  
28 relating to this investigation, steroids, or whatever?  
A: Right.  
Q: Mr. Anderson and you would not talk about that. You didn't want to talk  
about that. Is that right?  
A: I don't want to know anything. That's exactly right.

Statement K

27 Q: Okay. Had you ever taken flaxseed oil, by the way, before[?]  
28 A: I never asked Greg. When he said flaxseed oil, I just said "Whatever." It was  
in the ballpark.

1 Q: Right

2 A: You know, in front of everybody. I mean, all the reporters, my teammates. I  
3 mean, they all saw it. I didn't hide it. I didn't hide, I didn't hide anything. I mean,  
4 I didn't question anything when he—you know, if I'm at the ballpark or  
5 something—you know, trainers come up and say: "Hey Barry, try this." I don't  
6 really question it, move on. You know?

7 Statement L

8 Q: And during the course of that conversation or interview, did the subject matter  
9 come up about what Mr. Hoskins, the individual that you mentioned, what he  
10 might say about  
11 you?

12 A: No, I don't recall any of that.

13 Q: Did - - were you asked during that interview, do you recall having been asked,  
14 whether you had ever taken steroids?

15 A: I don't recall that conversation coming up.

16 Q: Okay. In fact, you said you had never ever taken steroids; is that right?

17 A: I - - I - I - I don't know what I talked to them about. But I don't believe that  
18 was any of the conversation.

19 Q: To your knowledge, that was never mentioned in the conversation at all?

20 A: Not that I know of.

21 The issue of whether a defendant can be convicted of obstructing a grand jury based on  
22 statements which are not specified in the obstruction charge was argued, but not decided, in Ms.  
23 Thomas's appeal to the Ninth Circuit. The Circuit correctly noted that, as demonstrated in the  
24 jury's special verdicts, Ms. Thomas was convicted on the Count Six obstruction charge based on  
25 two statements — those contained in Counts One and Three — that were clearly detailed in her  
26 indictment. That being so, the "not limited" language of the indictment and the injection into the  
27 trial of statements not specified in the indictment simply did not matter. Given the jury's reliance  
28 on the statements delineated in Counts One and Three, there could be no claim that Thomas was  
denied fair notice of the charge on which she was convicted on Count Six, or that she might have  
been convicted of obstruction on a theory not approved by the Grand Jury. As the Circuit noted:

The jury instructions on this count expressly stated that Thomas would be guilty of obstruction of justice if "*one or more* of the following statements obstructed, influenced or impeded the due administration of justice," and cautioned the jurors that "[a]ll of you must agree as to which *statement or statements* so qualify." (Emphasis added.) The jury ultimately unanimously concluded that the statements contained in count one and count three both "obstructed, influenced or impeded the due administration of justice, or were made for the purpose of obstructing, influencing or impeding the due administration of justice," thus supporting a guilty verdict on the obstruction of justice count even if the district court erred in allowing the jury to consider statement A and

1 statement B. The jury's unanimous findings that statements one and  
2 three independently supported its obstruction of justice verdict  
3 render any error on the instructions ultimately submitted to the jury  
4 harmless.

5 *Id.*, 612 F.3d at 1131.

6 Thus, the question whether it was error for the government to seek to convict defendant  
7 Thomas of obstruction of justice by alleging that she gave the Grand Jury unspecified “evasive,  
8 false or, misleading” testimony, and then shoe horned specific statements not included in the  
9 indictment into its proposed jury instructions on the obstruction charge, remains undecided. As  
10 Mr. Bonds will demonstrate, even were it possible to conceive of a case in which such a charging  
11 strategy could pass constitutional muster, this is not that case.

12 The government has ten opportunities with the false statement counts to gain the  
13 conviction it seeks, and the same ten statements can serve as the bases for obtaining that  
14 conviction on Count Eleven. As the *Thomas* decision makes clear, the “not limited” language  
15 found in this case in Count Eleven can come into meaningful play only if the trial jury were to  
16 find Mr. Bonds not guilty of making the false statements specified in Counts One to Ten (which  
17 are then reincorporated in Count Eleven). That being so, the portions of the Grand Jury  
18 transcript found at A through L of the government’s proposed instruction on Count Eleven are a  
19 Hail Mary pass — more accurately, twelve Hail Mary passes — to be hurled in desperation  
20 should the jury find that Mr. Bonds did not knowingly make a false declaration to the grand jury  
21 in any of the instances specified in Counts One to Ten.

22 Defendant Bonds contends he cannot be convicted based under the “not limited”  
23 language of the indictment, nor upon paragraphs A through L of the government’s proposed  
24 instructions, for the following reasons:

- 25 A. While the allegedly false statements in Counts One to Ten later incorporated in  
26 Count Eleven include a materiality element, the statements in A to L of the  
27 government’s proposed instructions do not, a fatal defect.
- 28 B. Count Eleven does not provide constitutionally adequate notice of the unspecified  
“evasive, false, and misleading” testimony Mr. Bonds is charged with giving to  
the grand jury, a fatal defect that cannot be cured by this Court’s instructions.
- C. The factual theories contained in A to L are not stated in the indictment, and thus  
it cannot be said that the Grand jury relied on any of them in indicting Mr. Bonds.

1 D. The multiple statements contained within the portions of the transcript excerpted  
2 in A to L render the obstruction charge so wildly duplicitous that no instruction of  
3 this Court could ensure a unanimous jury verdict.

4 Finally, it is of significance that the government's proposed instructions do not require a  
5 jury finding that any of the twenty two portions of Mr. Bonds' Grand Jury testimony incorporated  
6 in Count Eleven — the ten statements alleged in Counts One to ten and the twelve disclosed for  
7 the first time in A to J of the proposed instructions — were “intentionally evasive, false, and  
8 misleading.” Although the failure to instruct on an element of the obstruction charge alleged in  
9 the indictment would constitute a flaw in the proposed instructions rather than in the indictment  
10 itself, that defect adds to the cornucopia of error that is Count Eleven.

## 11 ARGUMENT

### 12 I. THE “NOT LIMITED” TESTIMONY IS NOT ACCOMPANIED BY A 13 REQUIRED ALLEGATION OF MATERIALITY

#### 14 A. Introduction

15 In *Thomas*, the Ninth Circuit ruled that materiality is an element of the crime of  
16 obstruction of justice. “[W]e conclude that although not expressly included in the text of § 1503,  
17 materiality is a requisite element of a conviction under that statute.” *Id.* at 1129. The  
18 government's proposed instructions on Count Eleven concede that in order to convict Mr. Bonds  
19 of obstruction based on a given statement, it must prove beyond a reasonable doubt that: “the  
20 statement was material to the grand jury before which defendant testified...” (*See* Government's  
21 Proposed Jury Instructions at 5, Special Instruction #1.)

22 Every element of a criminal offense must be pled in the indictment. *Jones v. United*  
23 *States*, 526 U.S. 227, 243 n.6 (1999); *see also United States v. Resendiz-Ponce*, 549 U.S. 102,  
24 111 (2007) (Scalia, J., dissenting) (“It is well established that an indictment must allege all the  
25 elements of the charged crime.”). The failure to allege an element is structural error which  
26 cannot be harmless. *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Count Eleven  
27 does not contain the terms ‘material’ or ‘materiality.’”

28 It is true, however, that each of the statements charged as the basis for a section 1623(a)  
offense in Counts One to Ten are accompanied by an allegation that Mr. Bonds “knowingly made

1 a false material declaration.” Given that these statements are incorporated into Count Eleven, it  
 2 can be argued that the government has met its burden of alleging in Count Eleven that each of the  
 3 Count One to Ten statements was “material to the grand jury before which defendant testified.”  
 4 That is not true of any statement which the government attempts to draw within the “not  
 5 unlimited” language of Count Eleven. For that reason, any attempt to base an obstruction  
 6 conviction on a statement other than those alleged in Counts One to Ten is legally barred.

7 **B. The “Not Unlimited” Language Does Not Provide the Fair Notice**  
 8 **Required by Both the Constitution and the Federal Rules**

9 The Sixth Amendment states that “in all criminal prosecutions, the accused shall enjoy  
 10 the right ... to be informed of the nature and cause of the accusation.” Federal Rule of Criminal  
 11 Procedure Rule 7(c)(1) applies this mandate with its requirement that an indictment or  
 12 information “be a plain, concise, and definite written statement of the essential facts constituting  
 13 the offense charged.” As the Supreme Court further explained in *Hamling v. United States*, 418  
 14 U.S. 87 (1974):

15 Our prior cases indicate that an indictment is sufficient if it, first,  
 16 contains the elements of the offense charged and fairly informs a  
 17 defendant of the charge against which he must defend, and, second,  
 18 enables him to plead an acquittal or conviction in bar of future  
 19 prosecutions for the same offense. . . . ‘Undoubtedly the language  
 20 of the statute may be used in the general description of an offence,  
 21 but it must be accompanied with such a statement of the facts and  
 22 circumstances as will inform the accused of the specific offence,  
 23 coming under the general description, with which he is charged.’

24 *Hamling*, 418 U.S. at 417-418 (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888))  
 25 (remaining citations omitted)

26 Significantly, deficiencies in the notice provided by an indictment cannot be cured by  
 27 other means, such as a bill of particulars. In *United States v. ORS, Inc.*, 997 F.2d 628 (9th Cir.  
 28 1993), the court upheld the district court’s dismissal of an antitrust indictment for failure to  
 allege with sufficient particularity the jurisdictional requirement of effect on interstate commerce.  
 It rejected the government’s claim that its bill of particulars obviated the problem because it had  
 provided the requisite specificity and instead applied the “established rule” that “the sufficiency  
 of an indictment must be determined from the indictment itself.” *Id.* at 631 n.5 (citation

1 omitted). *See also United States v. Cecil*, 608 F.2d 1294, 1297 (9th Cir. 1979) (holding bill of  
2 particulars cannot save invalid indictment because, if it could, defendants would be denied basic  
3 protection of grand jury proceedings in that they could potentially be convicted on facts not  
4 found by, or even presented to, grand jury) (citing *Russell v. United States*, 369 U.S. 749, 764  
5 (1962)); *United States v. Fleming*, 215 F.3d 930, 934-35 (9th Cir. 2000) (holding bill of  
6 particulars cannot cure indictment that fails to allege existence of pending judicial proceeding in  
7 prosecution for obstruction of justice).

8 The government's contention is that Mr. Bonds obstructed justice by engaging in the  
9 conduct described in A to L of its proposed instruction on Count Eleven. The "not limited"  
10 language utterly failed to provide Mr. Bonds with "a plain, concise, and definite written  
11 statement of the essential facts [those contained in A to L] constituting the offense charged." "  
12 Federal Rule of Criminal Procedure Rule 7(c)(1). Neither Nostradamus nor Cassandra, much less  
13 any human in possession of only normal predictive powers, could possibly have divined from the  
14 "not unlimited" language of Count Eleven what portion of the grand jury testimony the  
15 government would elect as grounds for the obstruction conviction. Plainly, the "not unlimited"  
16 language of Count Eleven does not contain "such a statement of the facts and circumstances as  
17 will inform the accused of the specific offence, coming under the general description, with which  
18 he is charged." *Hamling*, 418 U.S. at 417-418. The language must, as a minimum, be stricken  
19 from Count Eleven.

20 **II. THE "NOT UNLIMITED" LANGUAGE DEPRIVES MR. BONDS OF HIS**  
21 **SIXTH AMENDMENT RIGHT TO BE CONVICTED ONLY UPON A**  
22 **CHARGE RETURNED BY THE GRAND JURY**

23 In *Stirone v. United States*, 361 U.S. 212 (1960), the indictment alleged a Hobbs Act  
24 violation based on interference with commerce *entering* the state, but the evidence, the  
25 government's closing arguments, and the trial court's instructions permitted conviction on the  
26 theory of interference with commerce *leaving* the state. The Supreme Court reversed, holding  
27 that pursuant to the Fifth Amendment's grand jury clause, a defendant may not be convicted on a  
28 factual theory of criminal liability different than one on which he was indicted, even if that  
uncharged theory is supported by the evidence. In *United States v. Shipsey*, 190 F.3d 1081, 1086-

1 87 (9<sup>th</sup> Cir. 1999), the Ninth Circuit expressly rejected the argument: “that the district court  
 2 was not required to limit its instructions to a single theory because the [counts at issue] broadly  
 3 allege that Shipsey [violated that statute] without specifying any single means of doing so.” *Id.*  
 4 Rather, relying on the accused’s constitutional right to notice and to grand jury indictment, the  
 5 Circuit recognized that “there [was] a real likelihood that the jury actually convicted Shipsey for  
 6 a crime for which the grand jury did not indict him” and found reversible error in “the district  
 7 court’s instruction [that] constructively amended the indictment.” *Id.* Even without objection,  
 8 this required reversal because “the district court [t]here was precluded from charging the petit  
 9 jury on the theory . . . which the grand jury had not included in the indictment.” *Id.* at 1087; *see*  
 10 *also United States v. DiPentino*, 242 F.3d 1090 (9<sup>th</sup> Cir. 2001) (Conviction reversed because the  
 11 district court constructively amended the indictment in its instructions by permitting the jury to  
 12 convict the defendants of violating a work practice standard different from the one the indictment  
 13 charged them with violating).

14 The government can fairly claim that the Grand Jury relied on the allegedly false  
 15 statements contained in Counts One to Ten to indict on Count Eleven, because the indictment  
 16 incorporated the former statements into the obstruction count. But this Court cannot possibly  
 17 conclude that the grand jury relied on any of the statements contained in A to L to indict, for  
 18 those statements are referenced nowhere in the indictment. A to L cannot serve as  
 19 constitutionally acceptable bases for a conviction on Count Eleven.

20 **III. CATEGORIES A TO L IN THE GOVERNMENT’S PROPOSED**  
 21 **INSTRUCTIONS WOULD RENDER COUNT ELEVEN IRREMEADIABLY**  
 22 **DUPLICITOUS**

23 While the claims briefed above share common features with the issue in *Thomas*, the  
 24 issue of duplicity raised herein is unique to this case. This Court is well-versed in the Ninth  
 25 Circuit’s jurisprudence on duplicity:

26 Charging two offenses in one count of an indictment is contrary to  
 27 Rule 8(a) of the Federal Rules of Criminal Procedure, which  
 provides that an indictment contain “a separate count for each  
 offense.” *Id.* The joining in a single count of two or more distinct

1 offenses is termed “duplicity.” *See generally* 1 Wright, *Federal*  
 2 *Practice and Procedure* § 142 (2nd ed. 1982); 8 *Moore's Federal*  
 3 *Practice* § 8.03 (2nd ed. 1984). The vices of duplicity arise from  
 4 breaches of the defendant's Sixth Amendment right to knowledge  
 5 of the charges against him, since conviction on a duplicitous count  
 6 could be obtained without a unanimous verdict as to each of the  
 7 offenses contained in the count. *See United States v. UCO Oil*  
*Company*, 546 F.2d 833, 835 (9th Cir.1976). A duplicitous  
 indictment also could eviscerate the defendant's Fifth Amendment  
 protection against double jeopardy, because of a lack of clarity  
 concerning the offense for which he is charged or convicted. *See*  
*id.*; *Abney v. United States*, 431 U.S. 651, 654 . . . (1977).<sup>1</sup>

8 *United States v. Aguilar*, 756 F.2d 1418, 1420, fn. 2 (9th Cir. 1985)

9 Furthermore, in addition to the vices described in *Aguilar*, a duplicitous indictment may  
 10 generate related problems involving the admissibility of evidence, sentencing, and appellate  
 11 review. 1A Charles A. Wright, *Federal Practice and Procedure* § 142 (3d ed. 2007), and  
 12 citations contained therein.

13 Where duplicity is alleged, “. . . it is well settled that the test for determining whether  
 14 several offenses are involved is whether identical evidence will support each of them, and if any  
 15 dissimilar facts must be proved, there is more than one offense.” *Bins v. United States*, 331 F.2d  
 16 390, 393 (4th Cir. 1964); *United States v. Graham*, 60 F.3d 463, 467 (8th Cir. 1995)(separate  
 17 false statements are separate offenses if they require “different factual proof of their falsehood”);  
 18 1A Charles A. Wright, *Federal Practice and Procedure*, § 142 (3d ed. 2007) (Test used by courts  
 19 in deciding whether offenses are in fact separate is whether each requires proof of some fact that  
 20 the other does not).

21 Mr. Bonds does not contend that Count Eleven is duplicitous because it contains as  
 22 grounds for conviction the ten statements alleged to be false and material in Counts One to Ten.  
 23 Obviously, Mr. Bonds received clear notice of those statements in the indictment; the jury will be

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24  
 25 <sup>1</sup> In 2002, the quoted language from Fed.R.Crim.P. 8 was deleted by amendment. The  
 26 principle expressed in that language, however, remains in full force and effect given that the  
 27 Advisory Committee Note to the amendment states that its changes were “intended to be stylistic  
 only.”

1 asked to render a unanimous verdict on each one when deciding counts One to Ten; and the jury  
 2 can easily follow an instruction that they must agree unanimously on one or more of these ten  
 3 statements before returning a guilty verdict on Count Eleven. But the dog's breakfast contained  
 4 in A to L is another matter entirely.

5         It would be problematical enough if A to L added twelve statements to the Count Eleven  
 6 mix, meaning that the jury would be asked to consider twenty two possible factual bases for the  
 7 obstruction charge. But with the exception of A, the portions of the transcript contained in B to L  
 8 contain multiple questions and answers; category I alone contains no less than thirteen. Thus a  
 9 jury might unanimously agree on I as the basis for conviction on Count Eleven, but that could  
 10 mean that Juror One relied on Bonds's first response in I to convict — "This doesn't have Barry  
 11 Bonds's name on it. So, I'm not assuming that this is mine. That's what you just stated;" while  
 12 Juror two relied on his second — " Okay;" Juror Three on "This could be anybody's. Okay? So,  
 13 that's not fair;" Juror Four on "I see;" Juror Five on " I have no idea;" Juror Six on "Was – was  
 14 my urine test for – no;" etc. etc. etc. And the evidence needed to prove false the statement that it  
 15 was not Mr. Bonds's urine test — Bonds's sixth response in I — would obviously be different  
 16 than that required to prove false the defendant's twelfth response: that he doesn't "talk to Victor  
 17 Conte."

18         In total, A to L add to Count Eleven *forty nine* statements on top of the ten incorporated  
 19 from the false statement counts. A count with fifty nine different factual bases for conviction  
 20 makes a mockery of the Rule 8(a) requirement that an indictment contain "a separate count for  
 21 each offense." No instruction from the court could possibly cure its defects. Count Eleven must  
 22 be dismissed as duplicitous.

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**CONCLUSION**

For the reasons stated above, Count Eleven must be dismissed. Alternatively, the Court must order the “not limited” language of the count stricken.

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Respectfully submitted,

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