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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 v.)
16 BARRY BONDS,)
17 Defendant.)

No. CR 07-0732-SI

**UNITED STATES' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
OR STRIKE LANGUAGE FROM
COUNT ELEVEN**

Date: February 11, 2011
Time: 11:00 a.m.
Judge: Honorable Susan Illston

18
19 **INTRODUCTION**

20 Defendant Bonds moves to dismiss, or strike language from, Count Eleven of the
21 Indictment on the following grounds: (1) Count Eleven lacks the required element of materiality;
22 (2) Count Eleven fails to provide adequate notice to the defendant of the factual conduct for
23 which he is charged through its use of "not limited" language; (3) Count Eleven presents a risk of
24 impermissible variance and constructive amendment in its current form; and (4) the
25 government's inclusion of 12 specified evasive and misleading statements in the jury instructions
26 renders Count Eleven duplicitous.

27 The government agrees with the defendant's first point. Following the return of the
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1 current indictment in this case, the Ninth Circuit issued its ruling in *United States v. Thomas*, 612
2 F.3d 1107, 1114 (9th Cir. 2010). In *Thomas*, the Ninth Circuit found that materiality was an
3 “implicit” element of a Section 1503 count. *Thomas* at 1129. In light of *Thomas*, the
4 government agrees that Count Eleven should be superseded to add the required element of
5 materiality. As stated in court, the government will seek a superseding indictment prior to the
6 February 11, 2011 status conference in this case. That superseding indictment will allege
7 materiality as to the false, evasive, and misleading statements that constitute the core conduct
8 alleged in violation of 18 U.S.C. § 1503 in Count Eleven.

9 The defendant’s remaining claims regarding Count Eleven should be rejected. First, the
10 Court considered, and rejected, similar challenges to the obstruction of justice count (previously
11 identified as Count Fifteen) during earlier litigation in this case. *See Exhibit A, November 24,*
12 *2008 Order Re: Defendant’s Motion To Dismiss Second Superseding Indictment*, p. 8. Count
13 Eleven in the current indictment is the same charge as previously alleged Count Fifteen; it clearly
14 alleges that Bonds obstructed justice through his testimony in the grand jury on December 4,
15 2003. The elements and factual allegations are described in plain language that informs the
16 defendant of the nature of the charges against him. Count Eleven does not pose the risk of either
17 a variance or a constructive amendment as suggested by the defense; to the contrary, the charging
18 language could not be clearer in stating that the grand jury returned an obstruction charge based
19 solely on Bonds’s statements during his December 4, 2003 grand jury testimony. Finally, Count
20 Eleven is not duplicitous. As all of the statements alleged by the government in the indictment
21 obstructed justice, it is both sensible and appropriate that they be included in the same
22 obstruction allegation. The proposed jury instructions and proposed verdict form submitted by
23 the government specifically address the duplicity concerns raised by the defense.

24 ARGUMENT

25 1. **Background**

26 Count Eleven charges Bonds with obstruction of justice based on his repeated false
27 statements and evasive testimony in the grand jury. *See Exhibit B.* Count Eleven specifies that
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1 the perjury counts charged in Counts One through Ten constitute individual acts in furtherance of
2 the defendant's commission of obstruction of justice. Count Eleven further alleges evasive and
3 misleading statements which are "not limited to," but in fact are above and beyond, the ten false
4 statements alleged in the first ten counts of the indictment. On October 15, 2010, the
5 government put the defense on notice of 12 specific evasive and misleading statements on which
6 it intends to rely in its proposed jury instructions and proposed special verdict form. *See Exhibits*
7 *C, D.* The government's jury instructions and special verdict form require that the jury
8 unanimously conclude that the defendant intentionally made a particular false, evasive, or
9 misleading material statement with the intent to obstruct justice in order to find the defendant
10 guilty of a violation of 18 U.S.C. § 1503.

11 **2. Materiality**

12 As noted above, the government intends to seek a superseding indictment to add the
13 element of materiality to the conduct charged in Count Eleven. *See United States v. Thomas*, 612
14 F.3d 1107, 1114 (9th Cir. 2010) (holding that materiality is a requisite element of a conviction
15 under 18 U.S.C. § 1503). The addition of this language in the superseding indictment responds
16 directly to defendant's argument regarding materiality and renders this section of the defense
17 motion moot.

18 **3. Notice**

19 Bonds further objects to Count Eleven on the ground it fails to provide adequate notice of
20 the conduct alleged against him.

21 Once again, the defense is simply re-arguing a claim which has already been considered,
22 and rejected, by the Court. *See Exhibit 1, November 24, 2008 Order Re: Defendant's Motion To*
23 *Dismiss Second Superseding Indictment*, p. 8. The Court ruled correctly in denying this motion
24 in 2008, and the government respectfully requests that the Court deny this claim now. The Ninth
25 Circuit has held that an indictment must provide a description of the charges sufficient to enable
26 a defendant to prepare a defense, ensure that he is being prosecuted on the basis of facts
27 presented to the grand jury, enable him to plead double jeopardy against a subsequent
28 prosecution, and inform the court of the facts alleged to enable it to determine the sufficiency of

1 the charge. *United States v. Bohonus*, 628 F.2d 1167, 1173 (9th Cir. 1980). These requirements
2 are satisfied if the indictment alleges the elements of the offense and facts that inform the
3 defendant of the specific offense with which he is charged. *Id.* (citing *Hamling v. United States*,
4 418 U.S. 87, 117-18 (1974)). In assessing the sufficiency of the charge, the court must read the
5 indictment as a whole and accept as true the allegations of the indictment. *United States v.*
6 *Sampson*, 371 U.S. 75, 78-79 (1962).

7 The obstruction of justice offense alleged in Count Eleven, in violation of 18 U.S.C. §
8 1503(a), requires the government to demonstrate that the defendant: (1) corruptly (2) obstructed,
9 influenced, or impeded, or endeavored to influence, obstruct, or impede through his statements
10 (3) the grand jury proceeding in which defendant testified; (4) the statement was material to the
11 grand jury before which the defendant testified; and (5) the defendant knew the statement was
12 material to the grand jury before which he testified. *Thomas*, 612 F.3d at 1128-1131 (9th Cir.
13 2010).

14 The indictment in this case correctly alleges the elements of the crime (save the element
15 of materiality, which will be added to the superseding indictment, as previously discussed). As
16 currently constituted, the count reads, in pertinent part:

17 On or about December 4, 2003, in the Northern District of California,
18 and elsewhere, the defendant,

19 BARRY LAMAR BONDS,

20 did corruptly influence, obstruct, and impede, and endeavor to
21 corruptly influence, obstruct, and impede, the due administration
22 of justice, by knowingly giving Grand Jury testimony that was
23 intentionally evasive, false, and misleading, including but not limited
24 to the false statements made by the defendant as charged in Counts One
25 through Ten of this indictment.

26 All in violation of Title 18, United States Code, Section 1503.

27 Exhibit B.

28 The obstruction of justice count thus alleges that the defendant acted corruptly in
obstructing, influencing, and impeding the grand jury proceeding in which he testified. When the
government adds the *Thomas* requirement of materiality, this language will clearly put Bonds on
notice as to the charges against him. The indictment specifically alleges that Bonds provided

1 false, evasive, and misleading testimony throughout his grand jury testimony on a particular date.

2 The defense argues that the charge fails to provide him with adequate notice of the
3 charges against him. This argument ignores the plain language of the indictment. Count Eleven
4 could not be clearer in alleging that Bonds is charged with his false, evasive, and misleading
5 statements made in a specific grand jury proceeding on December 4, 2003. The alleged conduct
6 is limited to a very particular date and time and a very particular series of events, *i.e.*, Bonds's
7 statements in a single grand jury proceeding. Indeed, the allegations in this indictment are far
8 more specific than the law requires, because the allegations are limited solely to Bonds's false,
9 evasive, and misleading statements during his grand jury testimony. Far from a general
10 allegation, the universe of conduct for which Bonds has been charged is finite, and the defense
11 has every single word of that conduct available to it in the form of the grand jury transcript.

12 In sum, the indictment specifically alleges that the defendant obstructed justice. When
13 the indictment has been superseded to add the required element of materiality as to the false
14 statements, each element of each respective charge will be alleged, and the criminal conduct will
15 be described sufficiently to inform defendant of the specific offenses with which he is charged.
16 Accordingly, as a matter of law, defendant's motion to dismiss should be denied.

17 **4. Variance/Constructive Amendment**

18 Defendant's next claim appears to be that the indictment creates a risk of either a variance
19 or a constructive amendment. "A variance occurs when the proof introduced at trial differs
20 materially from the facts alleged in the indictment." *United States v. Antonakas*, 255 F.3d 714,
21 722 (9th Cir. 2001) (citation omitted). However, because proof at trial need not, indeed cannot,
22 be a precise replica of the charges contained in the indictment, significant flexibility is allowed in
23 the proof, provided the defendant was on notice of the "core of criminality" to be proven at trial.
24 *United States v. Sindona*, 636 F.2d (2d Cir. 1980).

25 The defense invokes *Stirone v. United States*, 361 U.S. 212 (1960), in support of its
26 concern that Count Eleven creates a risk of conviction on purportedly uncharged conduct.
27 However, the defense fails to acknowledge the limitations of *Stirone*, as recognized by the Ninth
28 Circuit in *Antonakas*:

1 The *Stirone* [*v. United States*, 361 U.S. 212 (1960)] rule treating a variance as a
2 constructive amendment of the indictment or information and assuming it to be
3 prejudicial, has been limited to cases in which the prosecution presents a complex of facts
4 *distinctly different* from that set forth in the charging instrument and not applied where
5 there is a single set of facts. If there is only a single set of facts, and the matter is
6 considered to only be a variance rather than a constructive amendment, the variance is
7 reversible error only if it has affected substantial rights, *and is not fatal unless the*
8 *defendant could not have anticipated from the indictment what evidence would be*
9 *presented at trial.*

10 *Id.* (Emphasis added).

11 The defendant further expresses the fear that this case will proceed to trial on charges
12 which were not passed on by the grand jury, a circumstance which would constitute a
13 constructive amendment to the indictment. The Fifth Amendment guarantees a criminal
14 defendant “[the] right to stand trial only on charges made by a grand jury in its indictment.”
15 *United States v. Freeman*, 498 F.3d 893, 907 (9th Cir. 2007), citing to *United States v. Adamson*,
16 291 F.3d 606, 614 (9th Cir. 2002) (internal citation omitted). A constructive amendment occurs
17 where there is “a complex of facts [presented at trial] distinctly different from those set forth in
18 the charging instrument,” or when “the crime charged [in the indictment] was substantially
19 altered at trial, so that it was impossible to know whether the grand jury would have indicted for
20 the crime actually proved.” *Von Stoll*, 726 F.2d at 586 (internal citation and quotation marks
21 omitted). The Ninth Circuit has observed that those cases in which a constructive amendment
22 has been found have “dealt with verdicts resting on proof so different from the proof accepted by
23 the indicting grand jury that substantial rights of the defendant were affected.” *United States v.*
24 *Pisello*, 877 F.2d , 762, 766 (9th Cir. 1989).

25 Bonds’s argument is legally and factually baseless. Bonds provides no legal authority for
26 his request for pretrial dismissal of the count in circumstances such as this; indeed, the
27 government is unaware of a single case in which a federal court has ever granted a pretrial
28 motion to dismiss a count based on such an argument. The central premise of defendant’s Fifth
Amendment right in this context is that he must only be tried on facts passed on by a grand jury;
as no trial has yet occurred in this case, it is at best premature for defendant to cite to this
authority in support of a pretrial motion to dismiss.

This fatal lack of legal authority is coupled with a complete absence of any facts to

1 support the defense argument. The apparent concern is that the defendant will be convicted of a
2 charge that the grand jury did not make against him. That is simply not a realistic possibility in
3 this case. The grand jury charged Bonds with obstructing justice through intentionally evasive,
4 false, and misleading conduct in his grand jury testimony. The indictment cites ten specific
5 examples of that obstructive conduct which are separately articulated in Counts One through
6 Ten. Expressly articulating those examples in the indictment did not preclude the grand jury
7 from considering other evidence of the defendant's obstructive conduct in his testimony. Indeed,
8 the only logical inference that can be drawn from the "including but not limited to" language of
9 the indictment is that the ten alleged false statements in Counts One through Ten were clearly not
10 an exhaustive list of the evidence of obstructive conduct considered by the grand jury when it
11 passed on Count Eleven. Rather than creating uncertainty, the government has committed to a
12 charging theory: that the factual basis in support of Count Eleven consists of the totality of
13 Bonds's intentionally evasive, false, and misleading conduct during her testimony, including, but
14 not limited to, the ten false statements.

15 Bonds's purported right to clarity on the grand jury's assessment of the individual
16 statements finds no support in the law. "The essential purpose of an indictment is to give the
17 defendant notice of the charge so that he can defend or plead his case adequately." *United States*
18 *v. Neill*, 166 F.3d 943, 947 (9th Cir. 1999). Count Eleven complies with that mandate, clearly
19 informing Bonds that he is charged with obstruction of justice based on his overall conduct in the
20 grand jury. Bonds has received his grand jury transcript in discovery and is therefore informed of
21 the scope of conduct considered by the grand jury in making its finding.

22 As summarized above, Bonds's arguments are both baseless and premature. Assuming
23 arguendo the possibility of a constructive amendment arising after the government presents
24 evidence at trial, however, the proper remedy for such a problem is not to dismiss the count, but
25 to provide the jury with appropriate limiting instructions. Jury instructions may cure an allegedly
26 amended indictment by limiting the charges on which the defendant may be convicted. *See*
27 *United States v. O'Connor*, 737 F.2d 814, 821-22 (9th Cir. 1984) (no impermissible amendment
28 of indictment charging conspiracy to possess with intent to distribute through evidence of other

1 transactions admitted at trial because jury instructions linked charge to violation alleged in
2 indictment). The government's proposed jury instructions resolve this question by providing 12
3 particular false statements, and requiring the trial jury to unanimously conclude that one or more
4 of the statements obstructed justice.

4. Duplicity

5 Defendant argues that Count Eleven is duplicitous because the count contains multiple
6 false, evasive, and misleading statements. In doing so, defendant implicitly contends that each
7 false, evasive, and misleading statement should be charged in a separate count.

8 An indictment is duplicitous where a single count joins two or more distinct offenses.
9 *United States v. Ramirez-Martinez*, 273 F.3d 903, 913 (9th Cir. 2001) (citation omitted). In
10 deciding whether an indictment is duplicitous, "[t]he court limits its review to a reading of the
11 indictment itself to determine *whether it may be read to charge a single violation.*" *United*
12 *States v. King*, 200 F.3d 1207, 1212 (9th Cir. 1999) (citing *United States v. Aguilar*, 756 F.2d
13 1418, 1420 n.2 (9th Cir. 1985)(emphasis added). If Count Eleven can be read to charge only one
14 violation, the defendant's motion should be denied.

15 Count Eleven charges the defendant with the single offense of obstruction of justice
16 through the totality of his grand jury testimony. The fact that the count alleges multiple false,
17 evasive, and misleading statements from his grand jury testimony as examples of this
18 obstructionist conduct does not mean those statements are separate offenses. The Ninth Circuit
19 has long recognized that if a witness tells separate and distinct lies, such false statements may be
20 charged separately, but counts based on mere repeating and rephrasing of the same question on
21 the same subject should be charged in a single count; to do otherwise would violate the
22 multiplicity doctrine, which precludes the charging of a single offense in different counts.

23 *Gebhard v. United States*, 422 F.2d 281, 289-290 (9th Cir. 1970). In finding that multiple false
24 statements related by subject matter *should* be charged in a single count, and finding numerous
25 counts pertaining to the same subject in an indictment to be multiplicitous, the Ninth Circuit in
26 *Gebhard* stated:

1 We are of the opinion that only one count in each of these groups should be
2 allowed to stand. Otherwise a prosecutor could run up a possible perjury sentence
indefinitely merely by repeating the same question. Single punishment for a single
lie should suffice.

3 Id. at 290.

4 The government has complied with the Ninth Circuit's mandate in this case. Here, the
5 government has alleged that Bonds obstructed justice throughout his grand jury testimony
6 through his ten false statements and 12 additional evasive and misleading statements. All of the
7 false, evasive, and misleading statements obstructed justice by interfering with the grand jury's
8 ability to assess evidence in connection with its investigation into the illegal trafficking in
9 anabolic steroids committed by Bonds's steroid dealer, Greg Anderson, and others involved in
10 steroid trafficking in the Balco conspiracy. As all of the statements alleged in connection with
11 the obstruction of justice count clearly pertain to the topic of the defendant's receipt and use of
12 anabolic steroids, they are properly charged in a single count as well under the *Gebhard* analysis.
13 Indeed, to hold otherwise would mean that the government could only charge this conduct by
14 adding 22 new obstruction of justice counts to the indictment, conduct which would doubtlessly
15 lead the defense to claim multiplicity.

16 Assuming *arguendo* that the Court finds Count Eleven to be duplicitous, that finding does
17 not support the dismissal or striking of language requested by the defendant. "The rules about ...
18 duplicity are pleading rules, the violation of which is not fatal to an indictment. Defendant's
19 remedy is to move to require the prosecution to elect ... the charge within the count upon which it
20 will rely. Additionally, a duplicitous ... indictment is remediable by the court's instruction to the
21 jury particularizing the distinct offense charged in each count in the indictment." *Ramirez-*
22 *Martinez* at 915, quoting *United States v. Robinson*, 651 F.2d 1188, 1194 (6th Cir. 1981). "In
23 other words, a defendant indicted pursuant to a duplicitous indictment may be properly
24 prosecuted and convicted if either (1) the government elects between the charges in the offending
25 count, or (2) the court provides an instruction requiring all members of the jury to agree as to
26 which of the distinct charges the defendant actually committed." *Ramirez-Martinez* at 915.

27 Consistent with this reasoning, the government has submitted a jury instruction requiring
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