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CLIENT MEMORANDUM

Ninth Circuit Rejects Broad Application of Obstruction of Justice Statute in the Barry Bonds Case

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AUTHORS

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On April 22, 2015, the U.S. Court of Appeals for the Ninth Circuit, sitting *en banc*, vacated the obstruction of justice conviction of former Major League Baseball player Barry Bonds. The *per curiam* opinion and three of four concurring opinions reaffirm the principle that a conviction for violating the omnibus clause of 18 U.S.C. § 1503 requires conduct that is sufficiently material to influence the "due administration of justice."[1] The principal concurring opinion, written by Judge Alex Kozinski, concludes that a single non-responsive answer by a grand jury witness cannot support a conviction for obstruction of justice under 18 U.S.C. § 1503 because it does not satisfy the materiality requirement. The court's decision could have a significant impact on prosecutors tempted to turn the "ordinary tug and pull" of testimony into a criminal prosecution for obstruction of justice.

[1] In the fourth concurring opinion, Judge William Fletcher concluded that the term "corruptly" in the omnibus clause of 18 U.S.C. § 1503(a) means "by bribery," and thus that false or misleading statements are not within the scope of conduct criminalized by that provision. Judge Fletcher invites the Supreme Court to take up the issue "either in this case or another."

The Court's Decision

In 2007, Bonds was indicted on four counts of making false statements and one count of obstruction of justice based on his federal grand jury testimony in the government's investigation of the Bay Area Laboratory Co-Operative (BALCO) steroids scandal. At trial, the jury could not reach a verdict on the false statement counts, but convicted Bonds on the obstruction count. The jury convicted Bonds based on only one of several alleged obstructive statements: a rambling, non-responsive answer to the simple question whether his trainer had ever provided him with a syringe with which to inject himself. In response to this question, Bonds testified, "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." After this exchange, and in other portions of his three-hour grand jury testimony, Bonds provided a direct and responsive answer, saying no.

Bonds filed a post-verdict motion for acquittal on the obstruction count, which the district court denied. A three-judge Ninth Circuit panel affirmed. The full court subsequently granted rehearing *en banc*.

While the ruling included only a brief *per curiam* opinion, 10 of the 11 judges agreed that Bonds' conviction must be reversed, joining in one or more of four concurring opinions. Judge Kozinski's concurring opinion, which was joined by five judges, found that Bonds' non-responsive answer "did not have the capacity to divert the government from its investigation or influence the grand jury's decision whether to indict anyone." At most, Judge Kozinski wrote, because the statement was non-responsive, it "impeded the investigation to a small degree by wasting the grand jury's time and trying the prosecutors' patience." But most testimony is "littered with non-responsive and irrelevant answers." He added that "[c]ourtrooms are pressure-laden environments and a certain number of non-responsive or irrelevant statements can be expected as part of the give-and-take of courtroom discourse." Thus, he concluded, "[b]ecause some non-responsive answers are among the road hazards of witness examination, any one such statement is not, standing alone, 'capable of influencing . . . the decision of [a] decisionmaking body'" such that the statement is sufficiently material to support a conviction for obstruction of justice.

Judge Kozinski warned that because 18 U.S.C. § 1503's "coverage is vast," "[b]y its literal terms, it applies to all stages of the criminal and civil justice process, not just to conduct in the courtroom but also to trial preparation, discovery and pretrial motions." Indeed, "[s]tretched to its limits," the statute could apply to the "bread and butter of litigation," such as being on the losing side of a motion or an appeal. In the hands of overzealous prosecutors, 18 U.S.C. § 1503 risks "[m]aking everyone who participates in our justice system a potential criminal defendant for conduct that is nothing more than the ordinary tug and pull of litigation." If "innocuous" statements in the context of lengthy testimony that includes direct answers to the government's questions were sufficiently material to support a conviction for obstruction of justice, "few witnesses or lawyers would be safe from prosecution." This is precisely the reason that courts have made clear that "the endeavor" that constitutes the basis of the offense "must have the 'natural and probable effect' of interfering with the due administration of justice." *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (citations omitted).

Judge N. Randy Smith's concurring opinion, joined by four judges, agreed that Bonds' statement did not impede the investigation. He reasoned that extending the obstruction statute's "reach to transient evasive or misleading statements would obviate the prosecutor's duty to thoroughly examine the witness." Rather, "a statement that 'goes off into the cosmos' merely triggers the prosecutor's duty to pin the witness down and elicit a clear response. Indeed, that is exactly what happened" here when "the prosecutor restated the same question and elicited a direct, unambiguous answer from Bonds: 'No.'"

Analysis

The Ninth Circuit's decision in the Barry Bonds case serves as an important reminder that courts should not allow prosecutors to turn limited non-responsive and irrelevant answers in the context of otherwise responsive testimony into obstruction of justice. Although three of the four concurring opinions fail to arrive at a consistent conclusion regarding the proper standard for materiality, the Ninth Circuit's decision nonetheless provides useful guidance to prosecutors and witnesses alike about the type of conduct that is necessary to support obstruction of justice charges. As Judge Kozinski explained, "If . . . a witness engages in a pattern of irrelevant statements, or launches into lengthy disquisitions that are clearly designed to waste time and preclude the questioner from continuing his examination, the jury could find that the witness's behavior was capable of having some sway."

The Ninth Circuit's ruling also may have implications that go beyond judicial proceedings. For example, applying the reasoning of the Ninth Circuit's decision with respect to 18 U.S.C. § 1503 to 18 U.S.C. § 1505, a sibling statute that criminalizes obstruction of justice before departments, agencies and committees, the ruling may cause prosecutors to think twice before bringing obstruction charges based on isolated non-responsive statements in cases involving prolonged and technical testimony in administrative proceedings. After the Barry Bonds case, unless obstructive testimony affects the outcome of a proceeding such as by thwarting an avenue of inquiry—a very high bar in administrative proceedings, where regulators can cause witnesses to provide testimony repeatedly—prosecutors may balk at pursuing obstruction charges that are not clear "home runs."

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