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## United States v. Barry Bonds v. Bronston: Can Section 1503 Handle the Truth?

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UNITED STATES *v.* BARRY BONDS *v.* BRONSTON:  
CAN SECTION 1503 HANDLE THE TRUTH?

DONALD K. KAZEE\*

*EDITOR'S NOTE: As this article went to press, the Ninth Circuit reversed the conviction of Barry Bonds for obstruction of justice. The per curiam opinion rested the reversal upon the lack of evidence that the statement for which Bonds was convicted was material, but occasioned four conflicting concurrences and a dissent. Professor Kazee's original article is presented here to provide context and critique for the vigorous debate brought forth by the Bonds trial and appeals. He has appended Extra Innings to his article to explain the implications of the divided en banc opinions and to show the continued threat to the liberty and justice despite the reversal.*

I. INTRODUCTION

Barry Bonds is the iconic player of his age in the national pastime. He embodies at once America's sincere devotion toward superhuman feats and cynical detraction of superhuman achievement. He treads an idol's path between deity and doubt. It is the least of wonders that he appears above the fray, annoyed at the tumult that would doubt his entitlement to wear the dignity of another Giant, his father.

Barry Bonds shares with his father, Bobby Bonds, the distinction of achieving five seasons with at least 30 home runs and 30 stolen bases. But the totality of Barry's achievement is shared with no one: 14 All-Star appearances, eight Gold Gloves, National League MVP seven times, Major League Player of the Year three times, twelve times Silver Slugger, and the Hank Aaron Award three

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of the first six years it was awarded. These honors but summarize the towering hits, the larcenous speed, and fielding miracles of 22 years.

Even for those unimmersed in the true believers' liturgy of statistics, Barry Bonds owns two certain signs of anointing from on high, which make him not just Bobby's son, but heir to the Babe himself. His 71 home runs in 2001 far surpassed Ruth's record of 60 home runs in a single season, cared for in turn by Roger Maris at 61 and Mark McGwire at 70. His 762 career homers surpassed Ruth's 714 and Hank Aaron's 755.

But a third sign of immortality is uncertain. Barry Bonds' otherwise automatic induction into the Baseball Hall of Fame is plagued by a widely shared suspicion that he stole more than bases. Allegations of taking superdrugs for superhuman strength have followed Bonds and other competitors from that thrilling and otherwise inexplicable upsurge in human prowess at the turn of the millennium.

Baseball was hardly the only sport mired in the suspicion and investigation of cheating by elixir. In San Francisco, a federal grand jury investigated the Bay Area Laboratories Cooperative (BALCO) for distributing performance enhancing drugs. The Grand Jury subpoenaed the testimony of high-profile athletes from cycling, track, and, of course, Major League Baseball. Their names had been discovered in connection with the investigation of Victor Conte, the owner of BALCO, and Greg Anderson, a BALCO employee and personal trainer to Barry Bonds. Anderson ultimately pled guilty to having distributed steroids without a prescription and to money laundering. In December 2003, Barry Bonds gave testimony to the grand jury. The questioning focused on Bonds' long-time relationship with Anderson and on Bonds' alleged use of substances obtained from BALCO or Anderson. Among the substances Bonds was asked about were human growth hormone, or HGH, and the steroid tetrahydrogestrinone, or THG, also called "the clear" for its having been designed to escape detection.

Barry Bonds was indicted in November 2007 on several counts of perjury before the grand jury under 18 U.S.C. §1623 (2006), and one count of obstruction of justice under 18 U.S.C. § 1503 (2006). During the lengthy pretrial process, the indictment was replaced by a "superseding" indictment three times, and ultimately three counts of perjury were presented to the trial jury. The three counts specified three passages in Bonds' testimony for which the grand jury found probable cause to charge that Bonds had made false material

statements. The trial jury failed to convict on any of the perjury counts, and the perjury counts were subsequently dismissed. The inference from this process is not at all the same as an acquittal. Rather, trial jurors were unable to unanimously agree one way or the other on a guilty or not guilty verdict. Such results do, however, indicate that one or more jurors believed that the prosecution failed to prove guilt beyond a reasonable doubt.

In the obstruction of justice count, the grand jury charged that Bonds corruptly impeded the due administration of justice by giving testimony that was “intentionally false, evasive, and misleading.”<sup>1</sup> The obstruction count specified, but was not limited to, the passages upon which the perjury counts were based. In pretrial proceedings to propose jury instructions for approval by the trial judge, the prosecution isolated a number of additional passages of testimony which allegedly exemplified Bonds’ endeavor to obstruct justice. The trial judge allowed four such exemplars to go to the jury, as well as the three passages already specified in the perjury counts.<sup>2</sup> The trial jury returned a guilty verdict for obstruction under Section 1503 on only one of the four exemplars submitted, denominated Statement C. Statement C is the underlined portion of the trial court’s jury instructions, in the context of the prior question.

[6. 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 other’s 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: That’s what keeps our friendship. You know, I am sorry, but that—you know, that—I was a celebrity child,

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1. See Third Superseding Indictment at 6, *United States v. Bonds*, No. 3:07-cr-07-0732-SI (N.D. Cal. Feb. 10, 2011), ECF No. 213.

2. See Instructions to Jury at 10-12, *United States v. Bonds*, No. 3:07-cr-07-0732-SI (N.D. Cal. Apr. 6, 2011), EFC No. 356.

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 . . .<sup>3</sup>

Statement C, then, was the sole basis of Bonds' obstruction conviction after eight years of investigation and four years of prosecution. The significance of Bonds' conviction reaches every witness stand in the United States, for Bonds is the first to be convicted for obstructing justice under 18 U.S.C. Section 1503 for testimony that the government conceded before the trial court to be true. Were Statement C false, Bonds' conviction would be an unremarkable example of a lie by a witness under oath having been proven to have the potential to impede, obstruct, or influence the due administration of justice, as was the companion BALCO case, *United States v. Thomas*.<sup>4</sup> But Bonds' conviction is a landmark if we take the government at its word, first as reported by Bonds' attorneys, and then by the government itself.

Bonds' Reply Brief in Support of Motions for Judgment of Acquittal and/or a New Trial quotes the government at trial:

In summing up its argument for submitting all of the lettered statements to the jury, the government declared: "[W]e would have charged him as a 1623 count if we were saying these are all false. These are in the evasive and/or misleading category." (RT 1588).<sup>5</sup>

This last statement requires some qualification, because the government on occasion has also claimed Statement C to be false. Nonetheless, the trial court rejected the government's alternate arguments that Statement C is false, in part because "there are other ways to understand defendant's testimony" so that Statement C was not "necessarily" false, and in part because "the government did not argue this reading to the jury."<sup>6</sup> The verdict was thus sustained by the trial court on the basis that it consisted of true statements.

On appeal, the government maintained the arguments that Statement C was false, or perhaps false because it was true: "Even if

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3. Instructions to Jury, *supra* note 2, at 11 (alterations in original).

4. *See* *United States v. Thomas*, 612 F.3d 1107, 1110 (9th Cir. 2010).

5. Defendant's Reply in Support of Motions for Judgment of Acquittal and/or a New Trial on Count Five at 8, *United States v. Bonds*, No. 3:07-cr-0732-SI (N.D. Cal. Aug. 8, 2011), ECF No. 408.

6. Order Denying Motion to Acquit and for a New Trial at 11-12 n.5, *United States v. Bonds*, No. 3:07-cr-0732-SI (N.D. Cal. Aug. 26, 2011), ECF No. 412.

Bonds actually considered his relationship with Anderson to be a friendship, and truly did not generally ‘get into other people’s business’ as a result of growing up with a famous father, these stitches of truth were used to construct a lie.”<sup>7</sup> The Ninth Circuit panel agreed: “[T]he cases interpreting § 1503 support our conclusion that misleading or evasive testimony that is factually true can obstruct justice.”<sup>8</sup>

The foregoing chain of argument and decision is sufficient for this article to take Statement C as true. Even if it were now argued or proven to be false, there is a clearly marked trail leading to but one destination, that factually true statements may be a basis for culpability under 18 U.S.C. § 1503, at least, for the moment, where those truths are “evasive” or “misleading.” Testimonial obstruction, *i.e.*, obstruction of justice based on the testimony of a sworn witness in court, had evolved only in early 1970s with antecedents in document tampering cases in the 1950s and 1960s. Heretofore, culpability for testimonial obstruction under Section 1503 had been applied to only three categories: (1) false denial of memory, considered tantamount to refusal to testify, *e.g.*, *United States v. Cohn*,<sup>9</sup> *United States v. Alo*,<sup>10</sup> (2) false denial of knowledge, likewise tantamount to refusal to testify, *e.g.*, *United States v. Williams*,<sup>11</sup> and (3) other false material statements, *e.g.*, *United States v. Thomas*.<sup>12</sup> The three have in common falsehoods which conceal avenues for further inquiry. As of *Bonds*, true statements are newly subject to Section 1503 if the sum of those truths may be characterized as “evasive” or “misleading.”

This development under the obstruction statute is squarely at odds with the Supreme Court’s clear instruction as to “misleading” or “evasive” true testimony, albeit in a case arising under the perjury statute, *Bronston v. United States*.<sup>13</sup> The unanimous *Bronston* court held that true but intentionally evasive or misleading statements are not a basis for culpability under the perjury statutes, provided that the literally true answer is “non-responsive” to the

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7. Brief for the United States as Appellee at 29-30, *United States v. Bonds*, 730 F.3d 890 (9th Cir. 2013) (No. 11-10669).

8. *United States v. Bonds*, 730 F.3d 890, 895 (9th Cir. 2013).

9. *See, e.g.*, *United States v. Cohn*, 452 F.2d 881, 884 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972).

10. *See, e.g.*, *United States v. Alo*, 439 F.2d 751, 754 (2d Cir. 1971), *cert. denied*, 404 U.S. 850 (1971).

11. *See United States v. Williams*, 874 F.2d 968, 981 (5th Cir. 1989).

12. *See United States v. Thomas*, 612 F.3d 1107, 1129 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1836 (2011).

13. *See Bronston v. United States*, 409 U.S. 352 (1973).

question. A re-examination of Statement C above reveals that Bonds' true statements did not in fact respond to the question asked by the Assistant U.S. Attorney, "Did Greg ever give you anything that required a syringe to inject yourself with?"<sup>14</sup> A non-responsive answer has not heretofore been a crime, especially since it is a partial condition of the *Bronston* defense to a perjury charge.

Even though both Bonds' attorneys and the government have been inconsistent as to whether Bonds' answer was responsive, this article will take the position that not only is Bonds' Statement C true, it does not respond to the question. The reader may judge the basis for that assumption, but it should be noted that following Statement C, the AUSA re-asked the question more specifically: "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?"<sup>15</sup>, to which Bonds answered "No."<sup>16</sup> The renewed question is at least one indicator that the questioner considered Statement C non-responsive as contemplated in *Bronston*.

Under *Bronston*, evasive truth is not criminal, but is the cue for the questioner to redouble efforts to bring the whole truth to light: "If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."<sup>17</sup> Truthful, non-responsive, but misleading statements are not perjurious under *Bronston* for two reasons: First, the texts of the perjury statutes, which proscribe either a "false material statement," 18 U.S.C. § 1623, or a material statement that the witness "does not believe to be true," 18 U.S.C. § 1621, do not on their terms cover true statements. Second, and more importantly for Bonds and for every witness, asking a jury to discern whether a truthful answer is intended to be misleading is at most a guessing game that undermines our adversary system for want of an ascertainable mark by which to decide, regardless of the statute under which the charge is brought. In *Bronston*, "[t]he Government does not contend that any misleading or incomplete response must be sent to the jury to determine whether a witness committed perjury because he intended to side-

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14. GJ Investigation No. 2002R01596: Reporter's Transcript of Proceedings Testimony of Barry Bonds, December 4, 2003 at 42 United States v. Bonds, No. 3:07-cv-00732-SI (N.D. Cal. Feb. 22, 2008) [hereinafter Bonds Testimony], ECF No. 35.

15. *Id.* at 43.

16. *Id.* at 42.

17. *Bronston v. United States*, 409 U.S. 352, 358-59 (1973).

track his questioner. As the Government recognizes, the effect of so unlimited an interpretation of §1621 would be broadly unsettling.”<sup>18</sup>

It is unsettling because it amounts at most to conjecture:

It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether “he does not believe [his answer] to be true.”<sup>19</sup>

This is as true of obstruction as it is for perjury. Truth and falsity represent marks that a jury of peers readily understands and conscientiously applies. Tasking twelve persons to second-guess a witness’s motive for telling a truth on the stand requires a degree of speculation that is forbidden to witnesses themselves. To quash conjecture, *Bronston* requires that the questioner persist in the inquiry. “The burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry.”<sup>20</sup>

Of course, the text of Section 1503 makes no reference to either truth or falsity, and the Omnibus Clause of that statute is read by the government to include any “corrupt” “endeavor to influence, obstruct, or impede, the due administration of justice” without limit or without regard to the truth or falsity of any testimony.<sup>21</sup> Yet a process without the truth at its heart and goal can be neither due nor just. It can be readily seen that so broad an application of Section 1503 to unresponsive truthful testimony spells the end not only of the *Bronston* doctrine, but of Congress’s express will toward sworn testimony that *Bronston* upholds. As the government conceded at Bonds’ trial, “[W]e would have charged him as a 1623 count if

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18. *See id.* at 361.

19. *Id.* at 359 (alteration in original).

20. *Id.* at 360. *Id.* at 360 (citing *United States v. Wall*, 371 F.2d 398 (6th Cir. 1967); *United States v. Slutzky*, 79 F.2d 504 (3d Cir. 1935); *Galanos v. United States*, 49 F.2d 898 (6th Cir. 1931); *United States v. Cobert*, 227 F. Supp. 915 (S.D. Cal. 1964)).

21. *United States’ Opposition to Defendant’s Motion for Judgment of Acquittal and/or a New Trial on Count Five at 4, 17, United States v. Bonds*, No. 3:07-cr-07-00732-SI (N.D. Cal. July 27, 2011), ECF No. 407.



*we were saying these are all false. These are in the evasive and/or misleading category.*" (RT 1588).<sup>22</sup>

In other words, *Bronston* prevented the government from charging Statement C as perjury, because the statement is true. But an obstruction indictment of Bonds' testimony generally, specified only in the proposed jury instructions, achieves an end run around both *Bronston* and the grand jury. The Statement C charge evades the Supreme Court's systemic instruction as to questioning by counsel throughout our adversarial process, and it evades the grand jury itself by substituting the trial judge for specific grand jury deliberations on the specific passage. This article will not gainsay the constitutionality of the latter, but assuming that a charge of obstruction may be so brought by indirection via proposed jury instructions, it is all the more essential to mind the Supreme Court's admonition against criminalizing truthful non-responsive testimony at all:

To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of "intent to mislead" or "perjury by implication."<sup>23</sup>

That confusion would be a special threat for a class of witnesses not heretofore described by the courts. *Bronston* posits that the Three Witches on the Heath are as guiltless as they are evasive because MacBeth failed to press on with his inquiry. The *Bonds* courts would find them guilty of obstruction. Yet not every witness who gives a truthful, non-responsive answer is so malicious. If the truthful non-responsive answer becomes under Section 1503 a shorthand for being misleading as well, witnesses innocent under either statute may become burdened with proving that they were not stalling, or misdirecting, or trying to be too clever by half. These are the witnesses who in everyday life or especially on the stand feel duty-bound to give contextual testimony in an effort to give the whole truth, or the precise truth amidst a sea of contradictions, or explain why the answer is unavoidably ambiguous because that's the way life is, or their knowledge is, or because that's the way they talk.

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22. Defendant's Reply in Support of Motions for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 5, at 8.

23. *Bronston*, 409 U.S. at 359.

The reader is invited to review Statement C as to whether it may be considered conscientiously contextual were it spoken by anyone without the notoriety of Barry Bonds. If so, *Bonds* risks becoming one of Holmes' great cases that make bad law, "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."<sup>24</sup>

Even were we to assume that Barry Bonds is in Statement C as devious as the government contends or as the jury found, crossing the line into finding concededly true statements to be felonious opens wide a prison door for many an ordinary person without the resources of Skadden Arps. As an example of the potential reach of the *Bonds* decision, one may consider a very similar statement far removed from the contention over Statement C. Statement C may be compared in substance and length to a statement attributed on the entertainment website Internet Movie Database (with what authority or orthography, who can say?) to the British actor John Thaw, best known in this country as Inspector Morse.

Sheila and I have had our ups and downs. But the thing that keeps us together apart from the fact we love each other, is having the same sense of humour and out look on like [*sic*], the same beliefs about what is important, what's right and wrong. If you fundamentally disagree, then when the initial romance goes, you've nothing to replace it with. You've got to have a solid foundation and mutual respect. I like Sheila, I respect her, and I know its vice-versa. That's what kept us together. We don't live in each others [*sic*] pockets. Sheila sometimes goes to the theatre with friends because I am working, and I go to things that would bore her. So in that sense we are not always together.<sup>25</sup>

Were Thaw asked under oath, "Where were you on the night in question?" with regard to Sheila, Thaw's quite ordinary statement would be indistinguishable from Statement C: Non-responsive and truthful (so far as we know) and implying that he does not know Sheila's whereabouts, nor she his. *Bronston* makes that testimony the occasion for adversary attorneys to do their work. *Bonds* makes having to do that work the occasion for a criminal charge.

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24. Northern Securities Company v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

25. John Thaw Biography, IMDB, [http://www.imdb.com/name/nm0857177/bio?ref\\_=nm\\_ov\\_bio\\_sm](http://www.imdb.com/name/nm0857177/bio?ref_=nm_ov_bio_sm) (last visited Apr. 15, 2015).

This article contends that the *Bonds* decisions are diametrically opposed to the Supreme Court's explicit and unanimous instruction in *Bronston*. That opposition is apparent not only in the government's theory of bringing the obstruction charge upon Statement C, but also in the very justifications and examples used by the *Bonds* courts in upholding that theory. This article does not argue that a doctrine from Sections 1621 and Sections 1623 *should be transferred* to Section 1503, but that *Bronston* has already spoken *comprehensively* to all sworn testimony at the very moment that testimonial obstruction under Section 1503 was in its incipiency. *Bronston*, brought under Section 1621, thus applies *prospectively* from 1973 *in pari materia* to Section 1503, just as it has also applied to Section 1623.<sup>26</sup> More fundamentally, *Bronston* defines the "due administration of justice" for witnesses and their questioners, so that Section 1503 is to be read to support it, rather than undermine it.

If *Bronston* does not apply to Section 1503, then the very strategy articulated by the *Bonds* prosecution will eviscerate *Bronston* and extinguish the perjury statutes. False testimony is already well established within Section 1503, and the inclusion of true, non-responsive testimony will permit any testimony whatever to be criminally charged if the prosecutor must persist in questioning to get the desired response. Thus will the specific command of Congress as to sworn testimony in Sections 1621 and 1623 vis-a-vis other obstructions be rendered a nullity. In its place will be the *Bonds* process of particularizing a shell indictment in the jury instruction process, with the definition of the law, rather than its enforcement, resting in the whim of the prosecutor and the latitude of the judge. Every witness may fear every question as the gate to prison. It will not be safe to tell the whole truth.

This article explains why *Bronston* applies to testimonial obstruction cases brought under 18 U.S.C. § 1503 generally and to *United States v. Bonds* specifically, as well as the troubling consequences to all witnesses and to the due administration of justice in our adversarial American trial system. Part II sets forth the case against Barry Bonds, including the indictment and the grand jury testimony at issue. Part III sets forth the scope of the obstruction of justice statute, 18 U.S.C. § 1503, and the genesis of its application to false testimony just prior to *Bronston*. Part IV gives the origins and key texts of the two principal perjury statutes, 18 U.S.C. § 1621, from which *Bronston* arose, and 18 U.S.C. § 1623, to which *Bronston*

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26. See, e.g., *United States v. Esposito*, 358 F. Supp. 1032 (N.D. Ill. 1973); *United States v. Slawik*, 548 F.2d 75 (3d Cir. 1977).

also applies. Part V gives the origin and rationale of *Bronston* and its application to all testimonial statutes, perjury and obstruction alike, including Section 1503.

Parts VI and VII turn to the key charge against Bonds, that his truthful non-responsive answer in Statement C was “evasive.” Part VI shows how truthful, non-responsive answers are not criminal under the perjury statutes pursuant to *Bronston*, even if the answer appears calculated to mislead the questioner. Part VII shows how “evasive” testimony has a well-settled and particular, rather than vernacular, definition in cases brought either as contempt prior to *Bronston*, or under Section 1503 since *Bronston*. “Evasive” testimony has been a basis for culpability under Section 1503 when it has signified in particular a false denial of recall, a false denial of knowledge, or a falsehood for which the *Aguilar* nexus is proven as well.<sup>27</sup> “Evasive” testimony may well characterize Statement C under *Bronston*, but *Bronston* removes it from culpability. The “evasive” testimony for which culpability under Section 1503 is well established is false testimony, which Statement C has been conceded not to be.

Part VIII gives a Ninth Circuit prelude to the *Bonds* case, the *Bonds* decisions’ collision with and implications for *Bronston*, and the *Bonds* courts’ rationales therefor. Part VIII (A) gives the adoption of *Bronston* principles in the Ninth Circuit in perjury cases. Part VIII (B) gives the development and doubts concerning testimonial obstruction in the Ninth Circuit since *Bronston*. Part VIII (C) compares the *Bonds* decisions concept for concept with the Supreme Court’s instruction in *Bronston* and analyzes the conflict between the two. Part VIII (D) examines in detail the authority cited by the *Bonds* courts and finds it without foundation. Part IX examines alternate justifications for the *Bonds* decisions, the broad scope of the Omnibus Clause of Section 1503 and the “endeavor” requirement. Neither of these supports the *Bonds* decisions upon close examination. Part X sets forth the continued vitality of Section 1503 toward testimonial obstruction, even though *Bronston* places truthful non-responsive answers outside its ambit. In Part XI, the consequences for witnesses and for our adversarial system of justice are set forth if *Bonds* is allowed to undermine *Bronston* with its challenge of quality to the people’s counsel as we seek truth for justice in the practice of law.

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27. See *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

## II. BONDS' INDICTMENT AND TESTIMONY

The Third Superseding Indictment on February 2, 2011, charged Barry Bonds with four counts of perjury (Counts One through Four) under 18 U.S.C. § 1623, and Count Five for obstruction of justice under 18 U.S.C. § 1503. Count Four was not submitted to the jury after trial, so that the jury only considered the following counts. The offending testimony is underlined.

## Count One:

Q: I know the answer—let me ask you again. I know we kind of got into this. Let me be real clear about this. Did he [Anderson] ever give you anything that you knew to be a steroid? Did he ever give a steroid?

A: I don't think Greg would do anything like that to me and jeopardize our friendship. I just don't think he would do that.

Q. Well, when you say you don't think he would do that, to your knowledge, I mean, did you ever take any steroids that he gave you.

A: Not that I know of.<sup>28</sup>

## Count Two:

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: So no one else other than perhaps the team doctor and your personal physician has ever injected anything in to [*sic*] 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

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28. Third Superseding Indictment, *supra* note 1, at 3.

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.<sup>29</sup>

Count Three:

Q: And, again, just to be clear and then I'll leave it, but he [Anderson] never gave you anything that you understood to be human growth hormone? Did he ever give you anything like that?

A: No.<sup>30</sup>

Count Five:

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.<sup>31</sup>

Count Five thus covers the whole of Bonds' grand jury testimony without specifying what portions obstructed justice beyond the passages upon which the perjury charges were based. During the jury instruction process, the government submitted a number of exemplars of additional obstructive testimony upon which to base the obstruction charge. The trial judge approved seven exemplars: the three allegedly perjurious statements, plus four additional testimony excerpts not charged as perjury. These four additional statements were labeled by letter A through D for submission to the jury.<sup>32</sup> By special verdict, the trial jury indicated that the guilty ob-

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29. *Id.* at 4.

30. *Id.* at 5.

31. *Id.* at 6.

32. See Instructions to Jury, *supra* note 2, at 7-12.

struction verdict on Count Five was based solely on Statement C.<sup>33</sup> Statement C, quoted above, in fact comes from the testimonial interval omitted but indicated by the starred gap in the Count Two perjury charge.

Counts One and Three are relevant to this article only insofar as no verdict was reached so that they were later dropped. There was likewise no verdict on Count Two and it was similarly dropped, but Statement C can only be understood in relation to Count Two with which it is integrally intertwined. The following transcript gives the context for Count Two and Count Five, Statement C. The grand jury convened for Bonds' testimony on December 4, 2003. Bonds was examined by Assistant U.S. Attorneys Jeffrey Nedrow and Ross Nadel, who exchanged questioning duties throughout the session. There were also questions from grand jurors, though not in this relevant colloquy:

*Questioning by AUSA Nedrow:*

Q: Did Greg ever give you anything that required a syringe to inject yourself with? (42:5-6)

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 other's 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? (42:7-16)

Q: Right. (42:17)

A: 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. . .

(42:18-23) [Statement C]

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

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33. See Verdict at 2, *United States v. Bonds*, No. 3:07-cr-07-00732-SI (N.D. Cal. Apr. 13, 2011), ECF No. 373.

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. (42:24-43:8)

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? (43:9-12)

A: No. (43:13)

Q: Okay. At his time, Mr. Bonds, the grand jury has— (43:14-15)

AUSA Nadel: If I could just go back to Mr. Nedrow's question a few moments ago. (43:16-17)

AUSA Nedrow: Okay. (43:18)

*Questioning by AUSA Nadel:*

Q: I wasn't sure if I heard the answer to the question. Other than your own personal doctor that you referred to – (43:19-23)

A: Well, the team – you know, you have to have a physical. I'm sorry. Forget about the team. You have to have a physical, they take blood from you then. But I wouldn't let no one, no. That's why my personal doctor drew the blood for BALCO to begin with. (43:24-44:3)

Q: So no one else other than perhaps the team doctor and your personal physician has ever injected anything in to [*sic*] you or taken anything out? (44:4-6)

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. (44:7-11)

Q: So – (44:12)

A: So sorry. (44:13)

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? (44:14-16)

A: No, no. [Count Two] (44:17)



*Questioning by AUSA Nedrow:*

Q: Just to follow-up before I go on to my other thing, have you ever yourself injected yourself [*sic*] with anything that Greg Anderson gave you? (44:18-21)

A: I'm not that talented, no. (44:22)

Q: Okay. We have a packet that I would like to identify as Exhibit 503. And I have distributed copies of it. And Mr. Bonds, this is the first page. So, we're going to refer to page one of that packet. And I'd like to give you a moment, Mr. Bonds, to look at it. And I want to ask you a couple of questions about it. (44:23-45:5)<sup>34</sup>

The precise exchanges among Bonds, Nadel, and Nedrow are crucial to an understanding of the *Bonds* courts' decisions and why it is necessary to apply *Bronston* to testimonial obstruction cases under Section 1503.

Barry Bonds was convicted of obstruction of justice for Statement C on April 13, 2011.<sup>35</sup> His conviction was upheld by a panel of the Ninth Circuit Court of Appeals on September 13, 2013.<sup>36</sup> He was granted review *en banc* by the Ninth Circuit July 1, 2014.<sup>37</sup>

### III. TITLE 18 U.S.C. SECTION 1503 AND CRIMES UNDER THE OMNIBUS CLAUSE

The obstruction of justice statute has its origin in the Act of March 2, 1831, 4 Stat. 487. Responding to perceived judicial abuses of the summary contempt power, the Congress limited the conduct which might be punished summarily by the federal courts. Section 1 of the 1831 act limited the courts' summary power to contemptuous conduct within the presence of the court. Having observed the conduct firsthand, the court might then directly punish the contemnor in vindication of its authority.<sup>38</sup> This first section is the predecessor of today's 18 U.S.C. § 401.

Section 2, however, provided that contemptuous acts outside the presence the court were chargeable only as a distinct criminal offense by indictment with the "normal safeguards surrounding criminal prosecutions."<sup>39</sup> Section 2 is the predecessor of the cur-

34. Bonds Testimony, *supra* note 14, at 42-45.

35. *See generally*, Verdict, *supra* note 33.

36. *See* United States v. Bonds, 730 F.3d 890 (9th Cir. 2013).

37. *See id.*

38. *See* Nye v. United States, 313 U.S. 33, 45-46 (1941).

39. *See id.* at 53.

rent obstruction of justice statute, 18 U.S.C. § 1503. Section 1505 is a parallel, but distinct, statute for obstruction of administrative departments and agencies and of Congress.

Section 1503(a) consists of two parts. The first part specifies certain forbidden acts and the second part, or Omnibus Clause, forbids obstruction of justice more generally. The first clause of Section 1503(a) provides:

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, . . . [shall be punished as provided in subsection (b)].<sup>40</sup>

The second or Omnibus Clause of Section 1503(a) continues:

or [whoever] 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).<sup>41</sup>

The scope of the Omnibus Clause is at the heart of the conflict between the *Bonds* decisions and *Bronston*. The Supreme Court described Section 1503 most recently in *United States v. Aguilar*:

The statute is structured as follows: first it proscribes persons from endeavoring to influence, intimidate, or impede grand or petit jurors or court officers in the discharge of their duties; it then prohibits injuring grand or petit jurors in their person or property because of any verdict or indictment rendered by them; it then prohibits injury of any court officer, commissioner, or similar officer

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40. 18 U.S.C. 1503(a).

41. *Id.*

on account of the performance of his official duties; finally, the "Omnibus Clause" serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute.<sup>42</sup>

The first clause prohibits an act (an "endeavor" to "influence, intimidate or impede") upon the objects of the act (a "witness" [until 1982], a "grand or petit juror," or "officer" of any "United States court" or "commissioner") to a particular end ("in the discharge of his duty") by either a motive or means ("corruptly, or by threats or force, or by any threatening letter or communication"). Distilled further, the clause prohibits a corrupt or coercive action toward obstructing the named persons from the discharge of official duties. This article will on occasion refer to the first clause of Section 1503(a) as the "discharge of duty" clause.

The second or Omnibus Clause, under which Bonds was convicted, prohibits the act (to "influence, obstruct, or impede," or an "endeavor" to do so) upon the object of the act ("the due administration of justice") by a motive or means ("corruptly, or by threats or force, or by any threatening letter or communication"). While the first clause is directed toward particular persons in the discharge of duties, the Omnibus Clause is directed at the whole process of justice, without apparent textual limits on the scope of that protection. The word "intimidate," appropriate to a person in the first clause, is replaced in the second clause by "obstruct," appropriate to the process of justice.

Prior to 1982, federal witnesses were included among the persons protected from influence, intimidation, or impediment under the discharge of duty clause, but the language as to witnesses was excised from Section 1503 upon the enactment of the more specific protections of the Victim and Witness Protection Act under 18 U.S.C. § 1512.<sup>43</sup> Nonetheless, the Omnibus Clause has been considered broad enough to yet apply to witness tampering.<sup>44</sup>

With or without explicit language as to witnesses, the more focused prohibitions of the discharge of duty clause have been used on occasion to either restrict, by *ejusdem generis*, or amplify, by analogy, the more general scope of the Omnibus Clause. Early in its

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42. *United States v. Aguilar*, 515 U.S. 593, 598 (1995).

43. *See* Law of Oct. 12, 1982, Pub. L. No. 97-291, 96 Stat. 1253 (1982).

44. *See, e.g., United States v. Wesley*, 746 F.2d 959, 962 (5th Cir. 1984).

history, the discharge of duty clause early applied to (1) jury tampering,<sup>45</sup> (2) corruptly influencing an officer of the court,<sup>46</sup> and (3) witness tampering.<sup>47</sup>

The Omnibus Clause has been applied to obstructions not specifically named in the statute, such as illicitly obtaining and passing copies of secret grand jury transcripts to targets of its investigation.<sup>48</sup> The Omnibus Clause has also been applied to testimony-related offenses where, for instance, the defendant refused to testify,<sup>49</sup> where the defendant attempted to suborn the perjury of witnesses in an underlying case,<sup>50</sup> where a prospective witness offered to alter his testimony for a bribe,<sup>51</sup> where a lawyer schemed to pressure his own client to incriminate himself on the witness stand for the benefit of another corrupt associate,<sup>52</sup> or where the witness persisted in reading a political statement rather than answering any questions.<sup>53</sup>

The Omnibus Clause has only been applied to a witness's sworn courtroom testimony since *United States v. Cohen* in 1962.<sup>54</sup> Cohen was charged with both tampering with documentary evidence and with false testimony. As a prosecution for false testimony under Section 1503 was a new development, the *Cohen* court drew upon the reasoning that had evolved in document tampering cases arising from the perjury trial of Harvey Matusow, a controversial figure during the Red Scare of the 1950s.<sup>55</sup>

Harvey Matusow had been, by turns, a member of the communist party, a paid informant to the FBI, a paid anti-communist witness before the McCarthy committee, a witness for the prosecution of an alleged communist, and an admitted perjurer who recanted

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45. See *United States v. Russell*, 255 U.S. 138, 141 (1921) (endeavoring to influence a petit juror by seeking information from and suggesting bribery via juror's wife).

46. See *United States v. Polakoff*, 121 F.2d 333, 334 (2d Cir. 1941) (soliciting prosecutor to recommend lenient sentence for defendant from whom bribe had been extracted and kept).

47. See *Samples v. United States*, 121 F.2d 263, 264 (5th Cir. 1941) (persuading witness not to appear to testify); see also *Catrino v. United States*, 176 F.2d 884, 886 (9th Cir. 1949) (persuading witness to commit perjury).

48. See *United States v. Jeter*, 775 F.2d 670, 672 (6th Cir. 1985).

49. See *United States v. Banks*, 942 F.2d 1576, 1579 (1991); see also *United States v. Jackson*, 2002 WL 1147559 (N.D. Ill. 2002).

50. See *Falk v. United States*, 370 F.2d 472, 476-475-76 (9th Cir. 1967/1966).

51. See *Anderson v. United States*, 215 F.2d 84, 85 (6th Cir. 1954).

52. See *United States v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999).

53. See *United States v. Ashqar*, 582 F.3d 819, 822 (7th Cir. 2009).

54. See *United States v. Cohen*, 202 F. Supp. 587, 588 (D. Conn. 1962).

55. See *United States v. Solow*, 138 F. Supp. 812, 815 (S.D.N.Y. 1956); see also *United States v. Siegel*, 152 F. Supp. 370, 375 (S.D.N.Y. 1957).

his testimony.<sup>56</sup> A grand jury convened to investigate Matusow's perjury. The resultant *Solow* and *Siegel* document tampering cases help us understand the evolution of testimonial obstruction cases.

Document tampering had been part of a witness tampering conviction under the discharge of duty clause in *Bosselman v. United States*, where the defendant had directed employees to alter business records subject to a *subpoena duces tecum*.<sup>57</sup> The witnesses who had altered the documents were not charged. *United States v. Solow* brought the intentional destruction of documents directly under the Omnibus Clause.<sup>58</sup> Solow was a voluntary witness who destroyed, on his own initiative, four letters in the files of *The Nation*, a political periodical, which he knew to be of interest to the *Matusow* grand jury.<sup>59</sup> There being no Section 1503 precedent on point, Judge Weinfeld found a common law obstruction case for removing business records out of state to be sufficient authority for bringing Solow's destruction of the letters within the Omnibus Clause of Section 1503.<sup>60</sup> The Omnibus Clause "is all-embracing and designed to meet any corrupt conduct in an endeavor to obstruct or interfere with the due administration of justice."<sup>61</sup>

Siegel was a lawyer who had met with Matusow on several occasions to discuss Matusow's testimony as a witness. Contemporaneous notes of the conversations had been dictated by Siegel and typed by his staff from stenographic notes. When Siegel, his staff, and the notes were subpoenaed, Siegel and his staff destroyed the notes, forged substitutes, and proffered these to the grand jury.<sup>62</sup> Judge Bryan emphasized the destruction of evidence:

Thus, the matters concerning which these defendants acted or endeavored to act plainly bear a reasonable relationship to the subject matter of the grand jury's inquiry, or to put it another way, are relevant to the inquiry. This being so, the defendants at least endeavored to influence, obstruct and impede the administration of justice, if they did not actually do so, by destroying the evidence on these matters, creating other evidence in its place and influenc-

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56. See P.J. Meitl, *The Perjury Paradox: The Amazing Under-Enforcement of the Laws Regarding Lying to Congress*, 25 QUINNIPIAC L. REV. 547, 554 (2007).

57. See *Bosselman v. United States*, 239 F. 82, 84 (2d Cir. 1917).

58. See generally *Solow*, 138 F. Supp. at 812.

59. See *id.* at 813-14.

60. See *id.* at 814-15 (citing *Commonwealth v. S. Express Co.*, 159 S.W. 517 (Ky. 1914)).

61. *Id.* at 814.

62. See *United States v. Siegel*, 152 F. Supp. 370, 372-73 (S.D.N.Y. 1957).

ing a witness to give false testimony concerning it. Any other view would hamstring grand jury proceedings on the one hand and emasculate the statute condemning obstruction of justice and endeavors to obstruct justice on the other.<sup>63</sup>

The false testimony concerning these notes was the basis of a perjury charge under Section 1621, rather than an obstruction charge under Section 1503.<sup>64</sup>

The cases incident to the Matusow grand jury set the stage for the expansion of Section 1503 to include false testimony. *Solow* had brought the direct tainting of documents by the defendant within the Omnibus Clause, as distinct from persuading a witness to taint documents under the discharge of duty clause as in *Bosselman*.<sup>65</sup> *Siegel's* combination of document tampering and false testimony by a witness, though prosecuted distinctly under Section 1503 and Section 1621, respectively, made it a ready source of authority for *United States v. Cohen*, the first testimonial obstruction case under Section 1503.<sup>66</sup>

Cohen was the admitted co-owner of a corporation that owned the land upon which an illicit still operated. Cohen's indictment under Section 1503 was for making false statements to a grand jury and for causing a "falsely signed lease contract" to be presented to the grand jury.<sup>67</sup> The *Cohen* court premised its opinion in the all-embracing scope of the Omnibus Clause, citing *Solow* and *Samples, inter alia*.<sup>68</sup> As either allegation would have sustained the indictment if held within the scope of Section 1503, the District Court focused first and primarily upon the falsely signed lease, analogizing it to the "concealment" of documents by destruction in *Siegel*.

Certainly it is as much an 'obstruction of justice' to cause to be presented to a grand jury a false document, as it is to destroy a document which is the subject of a grand jury investigation. The profering [*sic*] of misleading documents intended to deceive the grand jury toward a false finding is no less corrupt than the fraudulent conceal-

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63. *Id.* at 375.

64. *See id.* at 377-79.

65. *See* *Bosselman v. United States*, 239 F. 82 (2d Cir. 1917).

66. *See generally* *United States v. Cohen*, 202 F. Supp. 587 (D. Conn. 1962).

67. *See id.* at 588.

68. *See id.* at 588-89 (citing *United States v. Solow*, 138 F. Supp. 812, 814 (S.D.N.Y. 1956); *Samples v. United States*, 121 F.2d 263, 266 (5th Cir. 1941)).

ment of facts by the wilful [*sic*] destruction of documents.<sup>69</sup>

*Cohen's* "concealment of facts" originally ascribed to the destruction (*Solow* and *Siegel*) and falsification (*Siegel* and *Cohen*) of documents would ultimately become the template for why false testimony falls under Section 1503. But as for the false testimony in *Cohen* itself, Judge Clarie noted only that while Section 1503 and Section 1621 "overlap to some extent, it is not a valid reason to bar a prosecution under either, when the facts so justify," as trial by jury was guaranteed under both statutes.<sup>70</sup> Puzzlingly, the *Cohen* court sought to seal this position by invoking the Second Circuit's lack of comment in *United States v. Bufalino*<sup>71</sup> upon an indictment when overturning a conviction for conspiracy to obstruct justice and commit perjury.<sup>72</sup> Thus, *Cohen* sustained, for the first time, false testimony as a basis for indictment under Section 1503, as a seeming afterthought to a document tampering case.

However, the first obstruction case involving false testimony decided by a federal court of appeals reached the opposite conclusion.<sup>73</sup> In 1962, teamster leader Jimmy Hoffa was tried for violations of the Taft-Hartley Act. The trial ended in a hung jury. In 1964, Hoffa and others were tried and convicted under Section 1503 for endeavoring to bribe jurors in the Taft-Hartley trial.<sup>74</sup> Hoffa's efforts to secure a new trial were supported by the affidavits of four young women, including Patricia Ann Essex, claiming to have engaged in sexual relations as prostitutes with jurors sequestered during the obstruction trial.<sup>75</sup> As Essex was a minor, she was convicted under the Federal Juvenile Delinquency Act,<sup>76</sup> predicated upon violating the Omnibus Clause of Section 1503 by having caused to be filed an affidavit which was "false and known to be false when made."<sup>77</sup> On appeal, Essex contended that the Omnibus Clause did not extend to filing the false affidavit. The Sixth Circuit agreed that "false testimony alone will not amount to contempt of court," and quoted Justice Black:

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69. *Cohen*, 202 F. Supp. at 589.

70. *Id.*

71. 285 F.2d 408 (2d Cir. 1960).

72. *See Cohen*, 202 F. Supp. at 589 (citing *Bufalino*, 285 F.2d 408).

73. *See United States v. Essex*, 407 F.2d 214, 217 (6th Cir. 1969).

74. *See Hoffa v. United States*, 385 U.S. 293, 294 (1966).

75. *See United States v. Hoffa*, 247 F. Supp. 692, 700-02 (E.D. Tenn. 1965).

76. *See* 18 U.S.C. § 5031. (2014).

77. *See Essex*, 407 F.2d at 215-16.



‘All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of a trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear both truthful and false witnesses.’<sup>78</sup>

The *Essex* court distinguished the *Solow-Siegel-Cohen* line of cases as having been predicated primarily upon destroying, forging, or falsely signing documentary evidence as distinct from presenting false statements in an affidavit,<sup>79</sup> even though *Cohen* had expressly brought false testimony as well within the “all-embracing” language of the Omnibus Clause.<sup>80</sup> The Sixth Circuit apparently could not square the district court opinions with *In re Michael*, the only Supreme Court guidance available as to the application of Section 1503 as a contempt statute.<sup>81</sup>

At the end of the opinion, the Sixth Circuit turned to the scope of the Omnibus Clause vis-a-vis the discharge of duty clause of Section 1503:

The Government wishes to prosecute her under 18 U.S.C. § 1503 even though the District Court in originally rejecting Hoffa’s motion for new trial, the grand jury, and the same District Court again in the present case found that Appellant was untruthful in stating that she had contact with the Hoffa jurors. We refuse to broaden the obstruction of justice statute beyond the scope that Congress gave to it. As a criminal statute 18 U.S.C. § 1503 requires strict construction. The general clause at its end, moreover, must be read to embrace only acts similar to those mentioned in the preceding specific language. Neither the language of Section 1503 nor its purpose make the rendering of false testimony alone an obstruction of justice. If appellant committed any offense at all, it was the perjury charged in information against her.<sup>82</sup>

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78. *Id.* at 217 (citing *In re Michael*, 326 U.S. 224, 227-229 (1945)).

79. *See Essex*, 407 F.2d at 218.

80. *See United States v. Cohen*, 202 F. Supp. 587, 588-89 (D. Conn. 1962) (quoting *United States v. Solow*, 138 F. Supp. 812, 814 (S.D.N.Y. 1956)).

81. *See id.* at 589.

82. *Essex*, 407 F.2d at 218 (citations omitted).



The Sixth Circuit thus adopted the reasoning of the Ninth Circuit in *Haili v. United States*.<sup>83</sup> Haili had been charged under the Omnibus Clause of Section 1503 for having associated with a woman whose own probation was conditioned upon her having no contact with him. Each had a prior drug conviction.<sup>84</sup> The trial court had instructed the jury that the “due administration of justice” in the Omnibus Clause included the terms and conditions of probation.<sup>85</sup> The Ninth Circuit found this to be too far removed from the specific terms of the discharge of duty clause to be plausible under the Omnibus Clause:

The particularly defined instances of violation of that [Omnibus] section all relate to conduct designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court. In *Catrino v. United States*, this court quoted with approval the statement that the statute “is designed to protect witnesses in Federal courts and also to prevent a miscarriage of Justice by corrupt methods.”

Interfering with witnesses, jurors and parties operates to bring about a miscarriage of justice in specific cases. Under the rule of *ejusdem generis*, the general words which follow the specific words in the enumeration of prohibited acts in the section here involved must be construed to embrace only acts similar in nature to those acts enumerated by the preceding specific words. We are of the opinion that neither the language of § 1503 nor the history of its interpretation by the courts support the conviction of this appellant.<sup>86</sup>

Thus the Sixth Circuit chose to follow the Ninth Circuit to limit the scope of the Omnibus Clause, just as it followed the Supreme Court to limit the applicability of a contempt statute to a false statement in the form of an affidavit. But the *Solow-Siegel-Cohen* line of district court cases then received support from the Second

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83. See *Haili v. United States*, 260 F.2d 744 (9th Cir. 1958).

84. See *id.* at 745.

85. See *id.*

86. *Id.* at 746 (citations omitted) (quoting *Catrino v. United States*, 176 F. 2d 884, 887 (9th Cir. 1949)).

Circuit, which would eventually carry the day as to false testimony within the Omnibus Clause.<sup>87</sup>

Vincent Alo was an attorney who represented a stockholder of Scopitone, Inc., in negotiations with four other stockholders who disputed the inequitable distribution of shares from an exchange of stock with Tel-A-Sign, Inc. Alo twice met with the disputing Scopitone stockholders. The Securities and Exchange Commission investigated the transaction upon suspicions that Alo and another had come into substantial, but undisclosed beneficial ownership of the acquired Tel-A-Sign stock, though he was not an owner of record of either Scopitone or Tel-A-Sign stock.<sup>88</sup>

When Alo was asked about the meetings with Scopitone shareholders in an SEC hearing, Alo “pleaded a memory lapse some 134 times in one and a half hour’s testimony.”<sup>89</sup> He professed no memory of a corporation named Scopitone, Inc., nor “how the [dispute among shareholders] arose,” nor how the meetings were arranged, nor any substance of the meetings save the dissatisfaction of the shareholders and his urging an amicable resolution.<sup>90</sup> He was indicted under 18 U.S.C. § 1505 for “false and evasive” answers to thwart the SEC’s investigation.<sup>91</sup>

Section 1505 applies to obstruction of “proceedings pending before any department or agency of the United States,” or any “inquiry or investigation” before either house of Congress or any joint committee thereof. Like Section 1503, Section 1505 begins with a list of specific prohibitions against any endeavor to influence, intimidate, impede or injure witnesses before departments or agencies of the United States or before Congress, or against any tampering with documentary evidence subject to a civil antitrust demand. Section 1505 also has an Omnibus Clause which was the basis of Alo’s indictment. While the Omnibus Clause of Section 1503 prohibits the obstruction of “the due administration of justice,” Section 1505 prohibits obstruction of “the due administration of law” by United States departments and agencies and obstruction of “the due and proper power of inquiry” by the Congress.

On appeal before the Second Circuit, Alo argued for the same *ejusdem generis* limitation for the Omnibus Clause of Section 1505

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87. See *United States v. Alo*, 439 F.2d 751, 756 (2d Cir. 1971); see also *United States v. Cohn*, 452 F.2d 881, 884 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972).

88. See *Alo*, 439 F.2d at 752-53.

89. *Id.* at 753.

90. See *id.*

91. See *id.* at 573, 576.

that the Sixth Circuit had applied to false testimony for the Omnibus Clause of Section 1503 in *Essex*.<sup>92</sup> Alo argued that since the specific provisions of Section 1505 related to “tampering with evidence extrinsic to the actor, such as intimidation of a witness or the falsification of documents,”<sup>93</sup> the Omnibus Clause of Section 1505 could not reach defendants’ “suppressing their own knowledge of relevant facts.”<sup>94</sup> The Second Circuit rejected this restriction on Section 1505 by invoking the same analogy to “concealment” of documentary evidence as had *Solow*, *Siegel*, and *Cohen* for Section 1503.

So restrictive a gloss, however, would produce the anomalous result that concealing information recorded in one’s papers would constitute, as the appellant concedes, an offense under § 1505, but concealing data recorded in one’s memory would not. No rational basis for differentiating between these two types of evidence has been suggested to us, and without a clear statement of contrary Congressional intent we cannot attribute such an arbitrary distinction to the legislature. . . . The blatantly evasive witness achieves this effect as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.<sup>95</sup>

Citing Judge Learned Hand’s characterization of a witness’s transparently false memory losses in *United States v. Appel*,<sup>96</sup> Judge Irving Kaufman found Alo’s lapses to be tantamount to a refusal to testify:

It is true, that to convict Alo the jury had to conclude that he was lying when he professed loss of memory, but the gist of his offense was not the falsehood of his statements, but the deliberate concealment of his knowledge. The SEC was not interested in Alo’s mnemonic powers, but in the details of the Warwick Hotel meetings. Alo’s profession of forgetfulness was not so much false testimony as a refusal to testify at all.<sup>97</sup>

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92. *See id.* at 753-54.

93. *Alo*, 439 F.2d at 753.

94. *Id.* at 754.

95. *Id.*

96. *See United States v. Appel*, 211 F. 495, 496 (S.D.N.Y. 1913).

97. *Alo*, 439 F.2d at 754 (citing *Appel*, 211 F. at 496).

The Second Circuit drew three strands together and rejected a fourth in *Alo*. First, if the concealment of evidence by destroying documents (*Solow* and *Siegel*), or submitting false documents (*Siegel* and *Cohen*), was obstruction under the Omnibus Clause of Section 1503, the concealment of evidence by feigned forgetfulness on the witness stand was contempt under *Appel* and obstruction under the Omnibus Clause of Section 1505. Second, following Judge Learned Hand in *Appel*, false denials of memory are “evasive” in that they are tantamount to a refusal to testify, which is classically contemptuous.<sup>98</sup> Third, concealment via feigned forgetfulness is a circumstance “when the facts so justify” (*Cohen*) for prosecution under either the “all-embracing” (*Solow*) Omnibus Clause of 1505 or Section 1621.

Finally, the Second Circuit applied *ejusdem generis* not to restrict the scope of the Omnibus Clause of Section 1505, but to amplify it: “Like the specific provisions which precede it, [the general clause of] § 1505 deals with the deliberate frustrations through the use of corrupt or false means of an agency’s attempt to gather relevant evidence.”<sup>99</sup>

The Second Circuit’s holding in *Alo* as to Section 1505 was affirmed as to Section 1503 in *United States v. Cohn*.<sup>100</sup> Cohn was indicted under Section 1503 for “false and evasive” grand jury testimony. Like *Appel* and *Alo*, Cohn persistently feigned memory loss during his grand jury testimony as he was asked to identify his wife’s handwriting of notes on the back of an envelope, relating in substance to organized crime activities.<sup>101</sup> The effect of this sham forgetfulness was again concealment: “Here, by concealing information relating to Emmanuel’s suspected unlawful dealings in 1962 and 1963, Cohn may have hindered an investigation into Emmanuel’s subsequent activities as a Labor Department official.”<sup>102</sup> Judge Kaufman rejected any applicability of *ejusdem generis* to limit Section 1503, drawing expressly on *Alo*:

Although the specific provisions of Section 1503 relate to tampering, by corruption, threats or force, with sources of evidence extrinsic to the actor, the final all-embracing lan-

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98. See, e.g., *United States v. Wilson*, 421 U.S. 309 (1975); see also *United States v. Remini*, 967 F.2d 754 (2d Cir. 1992).

99. *Alo*, 439 F.2d at 754.

100. See *United States v. Cohn*, 452 F.2d 881, 884 (2d Cir. 1971)), *cert. denied*, 405 U.S. 975 (1972).

101. See *id.* at 882-83.

102. *Id.* at 883. (footnote omitted).

guage proscribes all conduct which corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, . . .” Cohn would have us limit the scope of this clause only to situations where the defendant interferes with other witnesses or documentary evidence. We rejected this argument under 18 U.S.C. § 1505, which tracks the language of Section 1503 in the context of administrative proceedings, in *United States v. Alo*.<sup>103</sup>

Thus as of January 1973 when *Bronston* was decided, there was a split in the circuits as to whether false testimony was within the scope of Section 1503. The Sixth Circuit in *Essex* relied upon the *ejusdem generis* precedent set by the Ninth Circuit in *Haili* and the Supreme Court’s limitation of perjury alone as contempt in *In re Michael* to limit the Omnibus Clause. The Second Circuit applied *ejusdem generis* to expand obstruction to include false testimony (*Alo*) and to reject any such limitation upon Section 1503 (*Cohn*). The Second Circuit drew upon the doctrine of concealment from document tampering cases (*Solow, Siegel, Cohen*) to apply to evasive false failures of memory (*Alo* and *Cohn*), tantamount to refusing to testify (*Appel*).

More specifically, there were at this time only three cases which had applied an obstruction statute to false testimony, and none was a garden-variety perjury case. First, since Cohen’s indictment under Section 1503 could be sustained by either the false lease or the false testimony, the first and primary focus of the *Cohen* court was the analogy between falsifying the lease and the destruction and falsification of documents in *Solow* and *Siegel*. Almost as an afterthought, *Cohen* applied Section 1503 to false testimony because of the frequently cited “all-embracing” language plus a single sentence as to the overlap with Section 1621 being no reason to bar a Section 1503 prosecution, provided that both statutes afforded jury trials. This is not to say that a justification for including false testimony within Section 1503 was absent. Rather, the weakness of having nothing more than this rationale is made plain by the *Cohen* court’s final stretch to cite the overturning of a conspiracy conviction on lack of evidence for the Second Circuit’s *lack of comment* on the indictment.<sup>104</sup> This last was indeed an effort to make something of nothing and explains the *Cohen* court’s far better sup-

103. *Id.* at 883-84 (alterations in original) (citations omitted).

104. *See id.* 589 *United States v. Cohen*, 202 F. Supp. 587, 589 (D. Conn. 1962) (citing *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960)).

ported emphasis on the falsification of the lease to sustain Cohen's indictment under Section 1503.

The other two testimonial obstruction cases as of *Bronston* were *Alo* and *Cohn*, both concerning blatantly feigned denials of memory tantamount to refusals to testify. While the denials were certainly false within the scope of Section 1621, it was the Second Circuit's equation of feigned forgetfulness to contempt that placed both cases within Section 1503.

As late as 1979, the unsettled scope of the Omnibus Clause was noted by the *Yale Law Journal*:

The circuit courts have split on how broadly to interpret the omnibus clause. Some courts have applied the *ejusdem generis* rule, under which the specific language of a statute . . . proscribes only acts similar in manner to those proscribed in the specific language. Other courts have adopted the broad rule that the statute proscribes all acts similar in result to those specified.<sup>105</sup>

It is in this context that *Bronston* must be understood to speak as to all sworn testimony, whether under the long-standing perjury statute Section 1621, the new perjury statute Section 1623, or the tentative incipient development of testimonial obstruction under Sections 1503 and 1505 from document tampering and sham forgetfulness under oath. While the courts of appeal ultimately followed *Cohn* rather than *Essex* as to testimonial obstruction after 1973, the post-1973 cases must, in turn, be understood in light of *Bronston*.

#### IV. THE PERJURY STATUTES

The First Congress forbade any person to "wilfully [*sic*] and corruptly commit perjury," without further definition.<sup>106</sup> The Eighteenth Congress deemed any person who should "knowingly and willingly swear or affirm falsely" in any federal proceeding to have committed perjury.<sup>107</sup> In 1874 and 1878, the Congress collected and revised all federal statutes into the United States Revised Statutes, and in so doing redefined perjury in U.S. Rev. Stat. 5392: "Every person who, having taken an oath. . .that he will testify declare or certify truly . . . wilfully and contrary to such oath states or

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105. Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1671 n.38 (1979) (citations omitted).

106. See Punishment of Crimes, ch. 9, § 18(a), 1 Stat. 112 (1790).

107. See Law of MarchMar. 3, 1825, ch. 65, § 13, 4 Stat. 115 (1825).

subscribes any material matter which he does not believe to be true, is guilty of perjury. . . ." This definition is operative today, having been re-enacted in statutory revisions as 35 Stat. 1111, Ch. 6, sec. 125 (March 4, 1909), codified at Penal Code Section 125 and then as 18 U.S.C. § 231 in 1940.

Congress amended the perjury statute as to the penalty at 62 Stat. 773, ch. 645, sec. 1 (June 25, 1948), codified at 18 U.S.C. § 1621. In 1964, Congress amended the text of Section 1621 to include statements made under oath overseas.<sup>108</sup> Subsequent revisions and reenactments in 1976<sup>109</sup> and 1994<sup>110</sup> are not relevant here.

In 1970, Congress enacted a parallel "false statements" statute, 18 U.S.C. § 1623, "to facilitate perjury prosecutions and thereby to enhance the reliability of testimony before federal courts and grand juries."<sup>111</sup> Section 1623 eliminated the vestiges of the "two witnesses" or corroboration required and retained under Section 1621, but did permit a limited recantation defense, heretofore unavailable under Section 1621. Section 1623 added an "inconsistent statements" offense for making two statements under oath that could not both be true, and which required of the government no proof as to which inconsistent statement was false. Most significant for our purposes is that Congress adopted a different definition of perjury from that used since 1873 in Section 1621 and its predecessors. While Section 1621 forbade anyone to state "willfully" under oath "any material matter which he does not believe to be true," Section 1623 lowered the *mens rea* threshold by forbidding a witness to "knowingly" make under oath any "false material declaration."

Congress's revision of Section 1621 in 1964 and enactment of Section 1623 in 1970 indicate no perfunctory recitation of ancient language, but a conscious consideration of the elements of the perjury statutes as Congress crafted its policy toward sworn testimony in court. When the Supreme Court had occasion to interpret the statutes on sworn testimony in *Bronston*, it had contemporaneous evidence of the Congressional will toward the prosecution of witnesses.

108. See Law of Oct. 3, 1964, Pub. L. No. 88-619, § 1, 78 Stat. 995 (1964).

109. See Law of Oct. 18, 1976, Pub. L. No. 94-0550, 90 Stat. 2534 (1976).

110. See Violent Crime Control and Law Enforcement Act, Pub. L. No. 107-56103-322, 108 Stat. 21471796, (1994).

111. See *Dunn v. United States*, 442 U.S. 100, 107 (1979) (citing S. Rep. No. 91-617 at 58-9 (1969)).

V. *BRONSTON V. UNITED STATES*

When the Supreme Court decided *Bronston* in January 1973, it spoke comprehensively on the Congressional will for all sworn testimony. Section 1621, reenacted as recently as 1964,<sup>112</sup> had condemned only that testimony of “any material matter that he does not believe to be true,” and was thus the premise for the *Bronston* doctrine. This had been corroborated little more than two years before *Bronston* by the enactment of Section 1623,<sup>113</sup> prohibiting “knowingly” “false material statements.”

When *Bronston* was decided, the Sixth and Second Circuits were split on including false testimony under the Omnibus Clause. A total of three cases had applied obstruction statutes to false testimony. The first, *Cohen*, was a document tampering case with a one sentence rationale for the attendant false testimony. A decade later, *Alo* and *Cohn* equated feigned forgetfulness to a refusal to testify, squarely within the ambit of contempt. There were thus few if any precedential fetters on the *Bronston* Court limiting its ability to make plain the will of Congress, unaltered to this day, as to the operation of the American adversary system of justice. Samuel Bronston was a Hollywood producer on an epic scale. His films, such as *King of Kings*, *El Cid*, and *55 Days at Peking*, were sweeping in scope, titanic in talent, and colossally costly. When another of his films, *The Fall of the Roman Empire*, failed to recoup its monumental expense, Bronston filed for bankruptcy. At the bankruptcy hearing, Bronston was asked the following questions by creditor’s counsel about bank accounts in Switzerland:

“Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, Sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks?

A. No, sir.

Q. Have you ever?

A. No, sir.”<sup>114</sup>

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112. See Law of Oct. 3 § 1, 78 Stat. 995 (1964).

113. See Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 924 (1970).

114. *Bronston v. United States*, 409 U.S. 352, 354 (1973).



At the time of testimony, Bronston himself had no Swiss bank accounts, even though he had had personal accounts with substantial activity in the past. His answer to the first question was literally true, though, as of that moment. Likewise, Bronston's answers about nominees were also true. However, Bronston's answer to the second question, ("Have you ever" [had] "any bank accounts in Swiss banks?") did not respond to the question about his own accounts as asked. Instead, Bronston answered with a truthful statement about his company: "The company had an account there for about six months, in Zurich."

Bronston's answer posed a novel legal issue. His statement about the company was unquestionably true, but it did not respond to the question as asked. By answering the question about the company, he arguably implied that he personally had not "ever" had a Swiss account. Bronston was charged with perjury under 18 U.S.C. § 1621, not for making a false statement, but by implying a falsehood with a true statement.

Bronston was indicted under Section 1621 in 1970, tried in January 1971, and convicted February 2, 1971. His motions for acquittal and a new trial were denied on April 15. While the District Court's opinion rested for the most part on refuting standard perjury challenges, it amplified the scope of perjury in accepting that "an unresponsive answer may be perjurious if tantamount to a willful attempt to conceal the truth."<sup>115</sup> Judge Tenney's opinion rejected Bronston's arguments that the question lacked specificity or was susceptible of multiple interpretations.<sup>116</sup> He found no evidence of the defendant's lack of understanding or memory.<sup>117</sup> He found *United States v. Slutzky*<sup>118</sup> inapplicable, as the testimony in *Slutzky* had been both responsive and true, while Bronston's answer was non-responsive. "Thus, although a truthful and responsive answer may not be perjurious, a technically truthful but unresponsive one may. Again, the jury was specifically instructed on this point."<sup>119</sup>

Like Judge Tenney, the Second Circuit found the question unambiguous and readily comprehensible.<sup>120</sup> Judge Oakes, writing for the majority, added two new points beyond the District Court's

115. *Bronston v. United States*, 326 F. Supp. 469, 471 (S.D.N.Y. 1971).

116. *See id.* at 471-72.

117. *See id.* at 471, 473.

118. *See United States v. Slutzky*, 79 F.2d 504, 505 (3d Cir. 1935).

119. *Bronston*, 326 F. Supp. at 472 (footnote omitted).

120. *See United States v. Bronston*, 453 F.2d 555, 558-59 (2d Cir. 1971), *cert. granted*, 405 U.S. 1064 (1972).

analysis. First, the majority cited *United States v. Rao* for the proposition that “an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury.”<sup>121</sup> This is baffling since Rao’s testimony as presented in the final paragraph of that opinion was both responsive and false.<sup>122</sup>

Second, the majority cited concerns that foreshadow the government’s position in *Bonds*: “A halftruth containing a lie, interjected by a knowledgeable and interested witness, may result in side-tracking the person inquiring into the existence of assets known only to the bankrupt. Or it may persuade the interrogator to proceed on another line of questioning.”<sup>123</sup>

Judge Lumbard, dissenting, addressed those concerns by disputing the majority’s premise that an answer that is all true can be half true and therefore half false and all perjurious. He refocused the issue from half-truths to whether a truthful unresponsive answer can be perjurious, even were there “a willful attempt to conceal some material fact.”<sup>124</sup> “It may be that this puts a burden on the questioner to recognize when he is being led astray, but I prefer to insist upon the questioner’s acuity than to distort the statute.”<sup>125</sup> Ultimately, the Supreme Court expressly agreed with Judge Lumbard.<sup>126</sup>

The *Bronston* case was granted *certiorari*<sup>127</sup> only six weeks after the Court had denied *certiorari* in *Cohn*.<sup>128</sup> The Court was thus fully apprised of the only Circuit Court case extending the Omnibus Clause of Section 1503 to false testimony.

As *Bronston* was charged under Section 1621, the Supreme Court initially and sufficiently grounded its disposition on the text of that statute. But the authority cited evinces clearly that the Court had the incipient development of testimonial obstruction in mind throughout the opinion. From page 358 forward, it is clear that the Court does not view *Bronston* as a perjury case at all, else the government would not urge the statute’s broad construction to “reach”

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121. *Id.* at 559 (citing *United States v. Rao*, 394 F.3d 354, 356-57 (2d Cir. 1968)).

122. *See Rao*, 394 F.3d at 356-57.

123. *Bronston*, 453 F.2d at 559.

124. *Id.* at 560 (Lumbard, J., dissenting).

125. *Id.* at 563.

126. *See Bronston v. United States*, 409 U.S. 352, 362 (1973).

127. *See generally Bronston*, 453 F.2d 555, *cert. granted* 405 U.S. 1064 (1972).

128. *See generally United States v. Cohn*, 405 U.S. 975 (1972).

the facts “beyond the precise words of the statute.”<sup>129</sup> Rather, the government has brought a testimonial obstruction case under the perjury statute, and it is to both perjury and testimonial obstruction that the Supreme Court speaks thereafter. In fact, the Court speaks specifically to what the *Bonds* courts have termed evasion: “If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.”<sup>130</sup>

The balance of the opinion is couched in terms of Section 1621, but is equally applicable in its rationale to all federal statutes governing testimony. The obvious example is Section 1623, but the rationales for the protection of witnesses, guidance for juries, and instruction for counsel to safeguard the adversary system are equally applicable to the far more general language of Section 1503, if only because that general language is the more ready tool for oppression. If the Court did not expressly refer to Section 1503, it is because the obstruction statute’s application to false testimony was mint new. Nonetheless, *Bronston* could not more directly and unanimously have addressed the issue only now arising in *Bonds* forty years after the fact.

The *Bronston* Court premised its application of Section 1621 to a bankruptcy proceeding upon the seriousness and depth of that inquiry:

The need for truthful testimony in a § 21(a) bankruptcy proceeding is great, since the proceeding is “a searching inquiry into the condition of the estate of the bankrupt, to assist in discovering and collecting the assets, and to develop facts and circumstances which bear upon the question of discharge” Here, as elsewhere, the perpetration of perjury “well may affect the dearest concerns of the parties before a tribunal. . . .”<sup>131</sup>

These words alone evince the *Bronston* Court’s cognizance of goals and requirements parallel to those of the obstruction statute. But the citation to *Norris*, regarding perjury before a United States Senate subcommittee, makes that analogy to obstruction explicit. The more complete language from *Norris* is:

129. See, e.g., *Bronston*, 409 U.S. at 358.

130. *Id.* at 358-59.

131. *Id.* at 357 (alteration in original) (citing *United States v. Norris*, 300 U.S. 564, 574 (1937); *Travis v. United States*, 123 F.2d 268, 271 (10th Cir. 1941)).

Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness' statement has once been made.<sup>132</sup>

In the very same paragraph, the *Norris* Court rejected a retraction defense, citing the very same concerns as do testimonial obstruction cases:

[The retraction defense] ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation, or other collateral means.<sup>133</sup>

The *Bronston* Court thus had all the ramifications of testimonial obstruction in mind, regardless of category or forum. Yet the Court emphatically placed the eliciting of the truth from witnesses through adversary questioning above threatening the witness with jail at every turn. Short of testimonial falsehood, more truth and clearer justice can be drawn from alert and persistent questioning than from a train of trials to vindicate the interrogator's frustration. If an answer is non-responsive to the question, or in Bonds' case provides an excess of context when the prosecutor wants a quick admission,<sup>134</sup> redoubled questioning is not the wrong to be avenged, but the remedy to be advanced.

Looking initially to the text of Section 1621, the *Bronston* Court granted the non-responsiveness of Bronston's first answer and the deceptive implication in his second, but noted that "any material matter which he does not believe to be true," is not the same as "any material matter that *implies* any material matter that he does

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132. *United States v. Norris*, 300 U.S. 564, 574 (1937).

133. *Id.*

134. *See* *United States' Opposition to Defendant's Motion for Judgment of Acquittal and/or a New Trial on Count Five*, *supra* note 21 at 14. In opposing Bonds' post-trial Motion for Acquittal or New Trial, the government complained:

But instead of giving a "yes or no" answer, the defendant evaded the question by talking about how only his personal doctor touched him, and launched into a distracting explanation of how a person (*i.e.* Anderson) could only be friends with him because "we don't get into each others' personal lives . . . he knows . . . don't come to my house talking baseball," and "I don't talk about his business."

*Id.*

not believe to be true.”<sup>135</sup> In a footnote, the Court observed why the statute should be strictly construed to exclude any culpability by “implication:”

Petitioner’s answer is not to be measured by the same standards applicable to criminally fraudulent or extortionate statements. In that context, the law goes “rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations.” In contrast, “under our system of adversary questioning and cross-examination the scope of disclosure is largely in the hands of counsel and presiding officer.”<sup>136</sup>

Fully aware of the context of testimonial obstruction from the *Norris* citation in the immediately preceding paragraph, the *Bronston* Court described those arenas in which weaving a tissue of lies from threads of truth may be punished. Testimonial obstruction is not among them. Testimonial obstruction is not like criminal fraud or extortion where the defendant is in charge of the representations. Rather, testimonial obstruction by definition arises from “our system of adversary questioning and cross-examination [which] is largely in the hands of counsel and presiding officer.”<sup>137</sup>

Testimony is to be treated as Congress has specifically provided. The *Bronston* Court rejected the very breadth of statute argument prosecutors’ advance in *Bonds*:

The Government urges that the perjury statute be construed broadly to reach petitioner’s answer and thereby fulfill its historic purpose of reinforcing our adversary fact-finding process. We might go beyond the precise words of the statute if we thought they did not adequately express the intention of Congress, but we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner’s unresponsive answer.<sup>138</sup>

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135. *Bronston*, 409 U.S. at 357-58 (footnote omitted).

136. *Id.* at 358 n.4 (citation omitted).

137. *See id.* at 358 (citing Model Penal Code § 207.20 cmt. at 124 (Tentative Draft No. 6, 1957)).

138. *Id.* at 358.

What is true of Congressional intent in Section 1621, reaffirmed in Section 1623, is that the testimony to be punished is false testimony. Section 1503, then in its incipiency of application to testimony, must be read in conjunction with the perjury statutes, for Congress could not reasonably intend the drastic action of an obstruction prosecution to cure a non-false testimonial mishap, that could be, and in Bonds' case was, "reached with a single additional question by alert counsel."<sup>139</sup> Section 1503, along with Section 1505, could apply as they had been applied to false testimony in *Cohen*, *Alo*, and *Cohn*, and remain consistent with *Bronston*. That consistency of application would persist for nearly forty years until *Bonds*.

If the presumption of innocence is to have any practical content, its application must begin in the grand jury room rather than at the end of the life-altering exhaustion of a trial, even where it ends in acquittal. The witness is a citizen at the mercy of state power, and if lawyers are at home in a courtroom, the same is not true of the rest of us. The lawyers have years of education, apprenticeship and experience with which to either elicit the truth or trap the unwary. Most witnesses are rookies and may fail to grasp the complexity of the situation. Worse yet is inept questioning, when repetitive reformulations are cast like dice before the unlucky witness. The Supreme Court well recognized that humans are fallible under interrogation, and a trial for that fallibility is a drastic measure for "mishaps" beyond the Congressional writ.

Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. It should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so, or that a debtor may be embarrassed at his plight and yield information reluctantly.<sup>140</sup>

Since the witness box is "in the hands of counsel and presiding officer,"<sup>141</sup> it is the responsibility of counsel to make sure that a drastic remedy is not invoked, if it can be avoided:

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139. *See id.*

140. *Id.*

141. *Id.* at 358 n.4.

It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.<sup>142</sup>

Nothing in this prescription for lawyers in the adversarial system applies any less to any testimony which may *post hoc* be prosecuted as obstruction rather than as perjury. Testimony is not *ex ante* either 1621 or 1503. It is at all times subject to the instruction of a unanimous Court fully cognizant of the potential of testimonial obstruction under Section 1503. The Court made no exceptions from *Bronston* for any truthful declaration apart from Footnote 4,<sup>143</sup> where, specifically, the lawyer is not in charge. Where the lawyer is in charge, making truthful declarations is not subject to the drastic remedy of criminalization. The lawyer in charge must do her duty. To make Section 1503 the substitute for the sanction the Court forbids<sup>144</sup> is to overturn *Bronston* by stealth.

The *Bronston* decision was not only premised upon the responsibility of lawyers, but the relation of the lawyer's responsibility to the role of jurors. The District Court, rejecting *Bronston*'s motion for acquittal had observed:

To be sure the interrogation was most inept; but this only begs further inquiry as to whether question number 2 ["Have you ever?"] was misleading or incapable of eliciting a single honest answer, or whether the defendant could consciously have taken advantage of the situation by giving an unresponsive answer in order to avoid disclosure of his Geneva account.<sup>145</sup>

By contrast, the Supreme Court expressly forbade saddling the jury with guesswork:

It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete

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142. *Id.* at 358-59.

143. *See id.* at 358 n.4.

144. *See* United States v. Tonelli, 577 F.2d 194, 198 (3d Cir. 1978).

145. United States v. Bronston, 326 F. Supp. 469, 471 (S.D.N.Y. 1971), *cert. granted*, 495 U.S. 1064 (1972).

on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether “he does not believe (his answer) to be true.”<sup>146</sup>

What is true of perjury juries is true of obstruction juries. If Bonds’ testimony consists of true, but unresponsive statements, it is but conjecture that it was intended to mislead or divert the examiner. It is but conjecture that the wily witness “could consciously have taken advantage of” an “inept” or inattentive questioner. It is but conjecture for a jury to decide whether the questioner was inept or inattentive as a predicate to considering the witness’s answer. It is but conjecture that an exposition providing truthful context, as Bonds gave, is too long, too rambling, too evasive, too clever or too vague. It is for the jury to decide what Congress has told it specifically to decide—whether the witness did not believe the statement to be true, or whether the statement was knowingly false. These are the limits of the Congress’s mandate, for to engage in further speculation threatens the adversary system of justice itself:

To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of “intent to mislead” or “perjury by implication.”<sup>147</sup>

The Bronson Court does not restrict the impact of such new and confusing elements to perjury cases alone. Fully aware of the incipency of testimonial obstruction under Section 1503, the Court found a danger across the “adversary testimonial system we know.” The witness’s “intent to mislead” is as vague a rubric under Section 1503 as it is under Section 1621. One can scarcely imagine the Court warning against such danger under the perjury statute only to countenance that danger for the sake of the putatively infinite reach of language from the 1831 obstruction statute. If there were any doubt, it is worth recalling that the 1831 reform, of which the obstruction statute was a part, was enacted to protect witnesses from arbitrary power, as affirmed in *Ex parte Hudgings*<sup>148</sup> and *In re*

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146. *Bronston v. United States*, 409 U.S. 352, 359 (1973).

147. *Id.*

148. *See generally Ex parte Hudgings*, 249 U.S. 378 (1919).



*Michael*.<sup>149</sup> The *Bronston* Court is of one accord with these precedents:

The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: “that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.”<sup>150</sup>

The same can be no less true of testimonial obstruction than of perjury, either in its incipiency at the time of *Bronston*, or now. The liberty of the witness to express herself as she can, though she be prone to explanations, excuses, or examples, is essential to extracting the facts sought by the examiner. To that end, the *Bronston* Court cited Wigmore:

[T]he English law “throws every fence round a person accused of perjury,” for “the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges, of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure: and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission,—such as publicity, cross-examination, the aid of a jury, etc.; and on the infliction of a severe, though not excessive punishment, wherever the commission of the crime has been clearly proved.”<sup>151</sup>

That protection is the more necessary under the expansive Omnibus Clause of the obstruction statute than under the more specific prohibition of the perjury statute. This context underscored the Court’s reluctance to criminalize unresponsive testimony: “Thus, we must read § 1621 in light of our own and the traditional Anglo-American judgment that a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony.”<sup>152</sup>

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149. See generally *In re Michael*, 326 U.S. 224 (1945).

150. *Bronston*, 409 U.S. at 359 (citing Study of Perjury, reprinted in Report of New York Law Revision Commission, Legis. Doc. No. 60, 249 (1935)).

151. *Id.* at 359-60 (citing J. WIGMORE, EVIDENCE 275—276 (3d ed. 1940); W. BEST, PRINCIPLES OF THE LAW OF EVIDENCE § 606 (C. Chamberlayne ed. 1883)).

152. *Id.* at 360.

Nothing in the words of Section 1503 makes that judgment any less true for the newly emergent testimonial obstruction. In fact, the balance of the *Bronston* opinion reveals that the government had brought an obstruction case about “derailing the questioner” in the guise of the perjury statute, perhaps because the indictment predated the Second Circuit’s opinions in *Alo* and *Cohn*. The only Court of Appeals case on testimonial obstruction under Section 1503 as of *Bronston*’s indictment was *Essex*. Whether denominated as perjury or obstruction, the *Bronston* court rejected the prosecution of truthful declarations in favor of proficient questioning:

The cases support petitioner’s position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry.<sup>153</sup>

This mandate does not change *post hoc* because the government chooses Section 1503 rather than Section 1621. Indeed, *Bronston*’s prosecutors themselves rejected the position advanced in *Bonds* in its broad form. The reader may substitute the phrase “testimonial obstruction” for “perjury” in the following passage to see why that is so:

The Government does not contend that any misleading or incomplete response must be sent to the jury to determine whether a witness committed perjury because he intended to sidetrack his questioner. As the Government recognizes, the effect of so unlimited an interpretation of § 1621 would be broadly unsettling.<sup>154</sup>

However, the government in *Bronston* pursued a narrower obstruction theory that is at the heart of the *Bonds* case: “It is said, rather, that petitioner’s testimony falls within a more limited category of intentionally misleading responses with an especially strong tendency to mislead the questioner.”<sup>155</sup> In *Bronston* this category was truthful non-responsive statements, which might imply a falsehood. In *Bonds*, it is the non-responsive “stitches of truth”<sup>156</sup> that might distract the examiner.

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153. *Id.*

154. *Id.* at 361.

155. *See id.*

156. *See* Brief for the United States as Appellee, *supra* note 7, at 29-30.

Though perhaps a plausible argument can be made that unresponsive answers are especially likely to mislead, any such argument must, we think, be predicated upon the questioner's being aware of the unresponsiveness of the relevant answer. Yet, if the questioner is aware of the unresponsiveness of the answer, with equal force it can be argued that the very unresponsiveness of the answer should alert counsel to press on for the information he desires.<sup>157</sup>

Thus the very evil of "misleading" at the base of the potential or effect of Statement C is rejected as a basis for prosecution. It is, rather, the occasion for counsel to redouble their efforts, as was indeed the case before the *Bonds* grand jury following Statement C. "[B]y hypothesis, the examiner's awareness of unresponsiveness should lead him to press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury."<sup>158</sup> Precise questioning is imperative as a predicate for the offense of testimonial obstruction as well, as the Court summarized its instruction for all testimonial crimes. We know this, for the coda of *Bronston* is directed to obstruction, not falsehood.

It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the "questioner's acuity" and not by a federal perjury prosecution.<sup>159</sup>

Thus the government's arguments and the Court's unanimous response demonstrate that it is not so much that the *Bronston* doctrine *should* be directed to testimonial obstruction, but that it was so directed *ab initio*. In so doing, the Supreme Court defined the "due administration of justice" when the witness takes the stand. A survey of cases based on "evasive" testimony reveals that until *Bonds*, this is precisely how the federal courts have applied the law.

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157. *Bronston*, 409 U.S. at 361-62 (footnote omitted).

158. *Id.* at 362.

159. *Id.*

VI. EVASIVE TESTIMONY UNDER *BRONSTON*

Bonds' indictment for Count Five alleged that his grand jury testimony had been "evasive, false, and misleading."<sup>160</sup> The government having conceded that Statement C is not "all false," but "in the evasive and/or misleading category,"<sup>161</sup> and Judge Illston having ruled that Statement C's alleged falsehood was not argued to the jury,<sup>162</sup> this article will take Bonds' conviction as necessarily predicated upon Statement C as "evasive" or "misleading" true testimony. Assuming that Statement C is also non-responsive to the question, as claimed by the government in its brief to the Ninth Circuit panel,<sup>163</sup> then Statement C is in the very non-responsive, literally truthful misleading or evasive category to which *Bronston* applies.

Like truth and falsehood, the terms "evasive" or "misleading" are not in the text of Section 1503, but are arguably included within the terms "impede," "obstruct," or "interfere" in the Omnibus Clause. Unlike truth or falsehood, "evasive" and "misleading" are not susceptible of so ready an understanding as criteria by which to measure crime. Certainly, a statutory element, such as "corruptly," may be quite broadly defined,<sup>164</sup> but due process requires that the meaning be tractable by both the citizen on the stand and the jury measuring her mind by her words. As Justice Scalia has observed:

What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.<sup>165</sup>

Nonetheless, the terms "evasive" and "misleading" are treated in Count Five as elements of the crime alleged which the govern-

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160. See Third Superseding Indictment, *supra* note 1, at 6.

161. See Defendant's Reply in Support of Motions for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 5, at 8.

162. See Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 11-12 n.5.

163. See Brief for the United States as Appellee, *supra* note 7, at 31.

164. See *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (defining "corruptly" as "having the intent to obstruct justice").

165. *United States v. Williams*, 553 U.S. 285, 306 (2008) (citing *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-71, 872 & n.35 (1997)).

ment must prove beyond a reasonable doubt. As such, the definition of these elements is all the more necessary when the terms are judge-made or chosen by the prosecution than when the elements are framed by the Congress, else the jury will lack a standard by which to gauge reasonable doubt. Fortunately, there is ample law to narrow the context and settle the legal meanings of “evasive” and “misleading” under the perjury and obstruction statutes. One line of cases follows *Bronston* covering “evasive” true statements that are calculated to deceive. The second line consists of Omnibus Clause cases brought under Section 1503 or 1505, where “evasive” has been applied not to literally true testimony as in *Bronston*, but rather to false accounts, false denials of knowledge, and especially, false denials of recollection. These two lines of cases “narrow the context” of “evasive” and “misleading” to impart meaning to these criteria which would otherwise be far too variable in the vernacular.

*Bonds* is the first case in which the word “evasive” has been applied under Section 1503 to testimony other than false testimony, and in particular, false denials of memory or knowledge. False denials are distinct from the “evasiveness” of truthful yet misleading testimony under *Bronston*.

The *Bronston* scenario provides an even clearer example: the critical difference between a falsehood suggested by implication and one asserted in an outright lie is notice. While it is impossible to detect a good lie without extrinsic evidence, an implied answer is technically nonresponsive and thus signals a potential problem. The Supreme Court emphasized this notice element in *Bronston*: “[T]he examiner’s awareness of unresponsiveness should lead him to press another question or reframe his initial question with greater precision.”<sup>166</sup>

To illustrate, we may consider as a baseline the “evasive” testimony of Billy Carrigan in *United States v. Earp*,<sup>167</sup> in which the Fourth Circuit applied *Bronston* to a Section 1623 case. Carrigan was among a group of Ku Klux Klan members who had attempted to burn a cross in the front yard of an interracial couple in North Carolina. As others struggled but failed to ignite the cross, Carrigan stood watch with a shotgun. When the intended victim discov-

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166. Note, *Ethical Abuse of Technicalities: A Comparison of Prospective and Retrospective Legal Ethics*, 112 HARV. L. REV. 1082, 1090 (1999) (footnote omitted) (quoting *Bronston v. United States*, 409 U.S. 352, 362 (1973)).

167. See *United States v. Earp*, 812 F.2d 917, 919 (4th Cir. 1987).

ered the attempt, the terrorists fled, with the unlit cross left behind. Carrigan testified before a grand jury:

“Q. How do you feel about burning crosses at the residences of interracial couples?

A. I don’t believe in it.

Q. Have you ever done it, sir?

A. *No, I haven’t.*

Q. Are you permitted, then, from Alexander County to go into Iredell County and burn crosses?

A. *I don’t burn crosses anywhere.*

Q. Would the Klan permit you to do that?

A. No, ma’am.”<sup>168</sup>

While the truth of “I don’t believe in it” and “No, ma’am” may certainly be doubted, only the italicized answers, “*No, I haven’t*” and “*I don’t burn crosses anywhere,*” were the bases for Carrigan’s false testimony charge under 18 U.S.C. § 1623.

The Fourth Circuit cited *Bronston’s* principles as articulated under Section 1621:

The burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry. This conclusion, the Court added, is not escaped even where the jury finds that the answerer intended to mislead the examiner. For even if the witness evades, it is the duty of the questioner to spot that evasion and “to flush out the whole truth with the tools of adversary examination.”<sup>169</sup>

The Fourth Circuit then applied *Bronston* to Carrigan’s grand jury testimony under Section 1623:

Applying *Bronston* to the case at hand leads to the conclusion that Carrigan’s perjury conviction must be set aside. Like the witness in *Bronston*, Carrigan’s statements were literally true although his second answer [“I don’t burn crosses anywhere”] was unresponsive. He did not burn a cross at Grimes’ residence in November, 1982 as charged in the indictment. And, while he no doubt knew full well that he had on that occasion tried to burn a cross, he was not specifically asked either about any attempted cross burnings or even whether or not he was at or near the

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168. *Id.* at 918.

169. *Id.* at 919 (citations omitted) (citing *Bronston*, 409 U.S. at 358-60).

Grimes home the night in question or whether he participated in the Grimes incident.<sup>170</sup>

The Fourth Circuit noted the government's failure in its questioning and the flaws in remedying its failure through prosecution:

A review of the record demonstrates that in questioning other witnesses, the questioner was able easily to attain the requisite specificity by asking about specific dates and locations. However, in questioning Carrigan, the questioner simply did not probe deep enough to recognize any potential evasion. The government cannot now correct this failure by a prosecution for making a false declaration. And the district court should not have allowed the jury to speculate whether or not Carrigan understood that the questions regarding cross burnings included the Grimes incident.<sup>171</sup>

Carrigan's answers are relevant to the Barry Bonds' testimony.

First, when asked, "How do you feel about burning crosses at the residences of interracial couples?," his answer, "I don't believe in it," is responsive and clearly had been untrue in the past and might have been chargeable as perjury, as were Bonds' Counts One, Two, and Three, or as obstruction, as in *United States v. Cohen*.<sup>172</sup> Whether the present tense of the question and the necessarily past tense of the incident in question (as in Bronston's personal accounts) posed a problem for prosecution can only be a matter of speculation for readers.

Second, when Carrigan was asked, "Have you ever done it, sir?" the answer, "No, I haven't," is both responsive and literally true, and is thus not perjury under Section 1621 or 1623 on their terms. *Bronston* is thus not implicated here, as the Supreme Court's articulation of *Bronston* applies strictly to non-responsive, but true testimony.<sup>173</sup> Responsive, truthful, yet misleading testimony has not yet been the subject of prosecution under Section 1503, though the District of Columbia Circuit Court rejected a prosecution under Section 1001.<sup>174</sup> If unresponsive yet truthful statements are

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170. *Id.* at 919.

171. *Id.* at 919-20 (citations omitted).

172. *See generally* *United States v. Cohen*, 202 F. Supp. 587 (D. Conn. 1962).

173. *See* *United States v. Corr*, 543 F.2d 1042, 1049 (2d Cir. 1976).

174. *See* *United States v. Safavian*, 528 F.3d 957, 965 (D.C. Cir. 2008).

brought within the ambit of Section 1503 by *Bonds*, responsive true testimony represents the next frontier of expansion of the Omnibus Clause.

Third, when Carrigan was asked, “Are you permitted, then, from Alexander County to go into Iredell County and burn crosses?,” the question represented not an inquiry to gain information, but a rhetorical question for the benefit of the grand jury to which an appropriate response is difficult to imagine. The question appears to ask what the law permits, though that makes certain assumptions about who is doing the permitting, *e.g.*, federal law, or North Carolina, or one of the counties, or the Klan, or something as yet unspecified. If answered, “Yes,” the answer would be responsive, though false, and incriminating.<sup>175</sup> Moreover, the answer “Yes” would be false regardless of whether Carrigan had attempted a cross-burning.

If answered “No,” the answer would be responsive, and true, and yet leave the incriminating impression that whatever Carrigan’s conduct had been, it was not permitted, along the lines of “Have you stopped beating your wife?” In any event, the true answer would be “No” regardless of whether Carrigan had attempted a cross-burning, because the law does not permit it.

With this question, it was the *Earp* prosecution, as much as Carrigan, who devised a false impression by implication through the rhetorical question and created a tactical pretzel for any jury to unravel.<sup>176</sup> Given the perils through implication of either a “Yes” or “No” answer, it is little wonder that Carrigan gave an unresponsive answer, certainly true, but leaving a self-exonerating implication: “I don’t burn crosses anywhere.” The answer is nonresponsive because it does not answer whether he is permitted to burn crosses in Iredell County. It is factually true in that no cross burned in the particular incident and Carrigan was not charged with cross-burning anywhere else.

“I don’t burn crosses anywhere” achieves something for the witness that the government calls “misleading” and that even a defense

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175. See generally *Earp*, 812 F.2d at 917. The *Earp* opinion makes no mention of any grant of immunity before the grand jury for Carrigan, but notes the state’s “failure to warn the defendants of their target-defendant status prior to their testifying before the grand jury.” *Id.* at 918 n.1.

176. See *United States v. Landau*, 737 F. Supp. 778, 784 (S.D.N.Y. 1990) (citing *Bronston*, 409 U.S. at 360). “Read in context, it is the prosecutor’s questions themselves, not merely Landau’s answers, that give rise to multiple interpretations. As such, the Government must be held to its burden ‘to pin the witness down to the specific object’ of the inquiry.” *Id.*



attorney could well concede to be “calculated.” The answer evades the Scylla and Charybdis of the “Yes” and “No” answers, each with its implicit self-incrimination. It is well to remember at this point that a witness confronted with such a dilemma is not always a Klan member whose lack of guilt is wholly accidental. The power of the state’s professional interrogators takes many a witness aback who might well perceive a trap in every question. Carrigan’s calculation was to give a non-responsive but truthful, if narrow, answer. The answer is in fact consistent with the advice that defense counsel give their testifying clients every day, as cited with approval by the District of Columbia Circuit in *Safavian*, a Section 1001 case: “Attorneys commonly advise their clients to answer questions truthfully but not to volunteer information. Are we to suppose that once the client starts answering a government agent’s questions, in a deposition or during an investigation, the client must disregard his attorney’s advice or risk prosecution under § 1001(a)(1)?”<sup>177</sup>

It is for these reasons that *Bronston* places such non-responsive, true answers beyond the scope of the perjury statutes, even if the answer is misleading. To hold otherwise would ask the jury to decipher, *inter alia*, whether the response is too calculated, wrongly calculated, calculated at all, calculated to cover up actual guilt or to evade a question’s inescapable, but false, implication of guilt. A jury would be asked to sort out whether there were multiple motivations for telling the truth, and whether a true answer is obstructive if there is one evasive motive, or whether an evasive answer is lawful if there is but one pure motive. As the Fourth Circuit pointed out, a jury should not be allowed to speculate on such motivations.<sup>178</sup>

Leaving such a calculation to a jury asks the jurors to legislate in each instance just what “evasive” or “misleading” means. It is not the certain standard of truth or falsehood:

[T]he state of mind of the witness is relevant only to the extent that it bears on whether “he does not believe (his answer) to be true.” To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of “intent to mislead” or “perjury by implication.”<sup>179</sup>

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177. *Safavian*, 528 F.3d at 965.

178. *See Earp*, 812 F.2d at 919-20.

179. *Bronston*, 409 U.S. at 359.

While the *Bronston* Court here spoke directly to the perjury statute, its observations apply with equal force to any testimonial statute as to the confusing effects of a “vague rubric” upon witnesses, upon juries, and upon the integrity of our adversary testimonial system. This is especially so for the Omnibus Clause with its anything goes text, quite distinct from the eminently tractable true and false standards of Sections 1621 and 1623. If statutory terms need to be crafted, interpreted, and applied with precision, the same must apply with yet greater force to judicially evolved terms such as “evasive” or “misleading,” used at times in the vernacular, at times as terms of art, and at times without regard to technical or historical meanings in other contexts. The non-statutory standards of “evasive” or “misleading” lie on the far side of justiciability and make the act of testifying a Shirley Jackson lottery.

Fourth, the question, “Would the Klan permit you to do that [burn crosses]?” narrows the third question, “Are you permitted, then, from Alexander County to go into Iredell County and burn crosses?” The permitter is defined as the Klan, not the law, and Carrigan’s answer, “No, ma’am,” is almost certainly false, perjurious, and very likely obstructive. While it is interesting that “No ma’am” was not the basis of prosecution, the import of the question for the prosecution is that the narrowed fourth question substituted in the grand jury’s mind for the more general third question and cast doubt upon Carrigan’s irretrievable third answer, regardless of whether that answer had been “Yes,” “No,” or nonresponsive.<sup>180</sup>

Prosecuting “No, ma’am” would have been a straightforward perjury charge for which the jury had a well-defined standard for deciding whether Carrigan testified to something he did not believe to be true.<sup>181</sup> Prosecuting “I don’t burn crosses anywhere” as evasive or misleading invited the jury to infer from Carrigan’s false answer to the narrowed fourth question that Carrigan’s answer to the more general third question had to also be false, even if literally true. Regardless of whether this is a permissible inference, the fourth question added yet another layer of complex conjecture to the jury’s already bewildering task. The Seventh Circuit spoke to this conundrum in a Section 1623 case:

The one lone question for which the defendant stands guilty of answering falsely had some of the elements of a

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180. See *Landau*, 737 F. Supp. at 783. “And again, the ambiguity here is not dispelled by the Government’s contention that the term “union difficulties” is refined in the following question to include union picketing.” *Id.*

181. See 18 U.S.C. § 1621 (2012).

trap unless the witness was sophisticated enough to do a better job answering the question than the government counsel did in asking it. To be safe the defendant would have had to recognize the various interpretations and give two answers to the one ambiguous question. The witness faced the grand jury alone without counsel being with him . . . .

. . . The [trial] jury may have guessed correctly, but it is not entitled to guess at all. A defendant "may not be assumed into the penitentiary."<sup>182</sup>

*Earp* illustrates the danger of using the criteria of "misleading" or "evasive" in testimonial cases lest the defendant be assumed into the penitentiary. *Bronston* rejects them as criteria for culpability with regard to truthful, non-responsive, but misleading testimony.

#### VII. EVASIVE TESTIMONY UNDER SECTION 1503 BEFORE AND AFTER *BRONSTON*

*Earp* illustrates the *Bronston* line of cases where "evasive" is used to define a misleading but non-responsive truthful answer danger of using the criteria of "misleading" or "evasive" in testimonial cases. With these pitfalls in mind, it is important to understand just how the term "evasive" has been applied in testimonial cases both before and after *Bronston*. Until *Bonds*, courts had used the description "evasive" to describe false denials which concealed evidence and shut off the opportunity for further examination. Such cases included not only ordinary lies, but also two specific types of falsehoods (1) false denial of knowledge, and (2) false denial of memory. This usage of "evasive" has been, until *Bonds*, wholly consistent with the Supreme Court's instruction in *Bronston*, as no false statement is subject to *Bronston* at all.<sup>183</sup> As the obstruction statute is rooted in contempt of court, the contempt cases provide the foundation for how "evasive" has been used in obstruction cases.

Judge Learned Hand used the word "evasive" to set the standard for criminal contempt to describe a deposition witness who had persistently and falsely denied remembering how he had dispersed funds he had withdrawn in the previous two weeks.

The power of the court to treat as a criminal contempt a persistent perjury which blocks the inquiry is settled by au-

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182. *United States v. Martellano*, 675 F.2d 940, 945-46 (7th Cir. 1982) (citing *United States v. Brumley*, 560 F.2d 1268, 1277 (5th Cir. 1977)).

183. *United States v. Corr*, 543 F.2d 1042, 1049 (2d Cir. 1976).

thority in this circuit. It is indeed impossible logically to distinguish between the case of a downright refusal to testify and that of evasion by obvious subterfuge and mere formal compliance.

The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court.<sup>184</sup>

Appel's evasions consisted of false answers as to how he spent or gambled away the money, and more importantly, that he falsely denied remembering salient events in the previous two weeks: how much he had lost at poker on purportedly multiple occasions or to whom he had sold a note. These blatant and persistent lies as to disbursement and to memory met the test of "obvious subterfuge" in the context of criminal contempt. Judge Hand reasoned:

The question, therefore, comes down simply to this: Is the story of his gambling losses so obviously and apparently a mere effort to block the examination that a court must in protection to itself hold that it is false and that he was attempting to prevent any effective examination? One cannot, of course, say that such a story is in all circumstances necessarily an absurd explanation, but the inability of the respondent to give the names of any places but one of these where he had lost any such sum as he stated, and his entire vagueness about matters which were so recent, and which must have impressed themselves upon his memory at the time to a greater extent, leaves no doubt in my mind that he was not stating what he knew, and was attempting to prevent any efficient examination.<sup>185</sup>

"Evasive" testimony has continued to signify feigned denial of recall in criminal contempt cases. A bank official, Lang, was questioned before a grand jury regarding transactions at the bank and held in contempt for his answers.<sup>186</sup> "The record of his testimony which was read in the District Court discloses a persistent effort to conceal facts he must have known by giving *evasive answers under the pretense of being unable to remember* [emphasis added] or to inform himself more fully as to the facts. His conduct was plainly designed

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184. *United States v. Appel*, 211 F. 495 (S.D.N.Y. 1913) (citations omitted).

185. *Id.* at 496.

186. *See Lang v. United States*, 55 F.2d 922 (2d Cir. 1932).

to obstruct the administration of justice. . . .”<sup>187</sup> This legal usage of “evasive” signifying feigned forgetfulness is consistent through yet more recent contempt cases:

First, if an evasive answer were not equated with a refusal to answer, even the most transparently false assertion of “I don’t remember” would be sufficient to avoid the recalcitrant witness statute. . . . A concocted evasive or false “I don’t remember” answer would provide an easy avenue for the reluctant witness to escape this high obligation with impunity.<sup>188</sup>

As an example, the Second Circuit approved the trial court’s finding that:

“Bongiorno’s answers indicating a lack of memory [were] evasive and false and constitute[d] a refusal to testify[,] in contempt of the court’s order.” The court noted Bongiorno’s “pattern” of “sudden lapse[s] of memory” with respect to discussions involving or relating to the target of the grand jury’s investigation.<sup>189</sup>

One conspiracy to obstruct case alleged “evasive” false statements by multiple parties both to police and to a grand jury, which varied as to why dozens of alleged organized crime figures convened and fled when discovered.<sup>190</sup> Their pattern of answers (visiting a sick friend, car broke down, came to a party, went for a ride) allegedly evinced a conspiracy to obstruct justice.<sup>191</sup> The Second Circuit found no evidence of an agreement for conspiracy, even granting that the statements appeared coordinated and false.<sup>192</sup> The import of *Bufalino* is that the gist of “evasiveness” is an allegation of lying.<sup>193</sup>

When testimony was first prosecuted under Section 1505, *Alo*, and Section 1503, *Cohn*, the “evasive testimony” squarely described

187. *Id.* at 923 (emphasis added).

188. *Matter of Battaglia*, 653 F.2d 419, 422 (9th Cir. 1981) (citations omitted).

189. *In re Bongiorno*, 694 F.2d 917, 922 (2d Cir. 1982) (alterations in original) (citations omitted). Even where contempt convictions have been reversed for want of proof, the courts used “evasive” particularly to describe a feigned denial of recall. *See, e.g., Ex parte Hudgings*, 249 U.S. 378 (1919); *Hooley v. United States*, 209 F.2d 219 (1st Cir. 1954); *Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983).

190. *See United States v. Bufalino*, 285 F.2d 408, 412-1314 (2d Cir. 1960).

191. *See id.* at 414.

192. *See id.* at 415.

193. *See Richardson v. United States*, 273 F.2d 144, 147 (8th Cir. 1959) (describing denials of knowledge in a criminal case as “evasive”).

feigned forgetfulness. Alo professed lack of memory over one hundred times in ninety minutes regarding a shareholder's meeting in which he represented the principal shareholder.<sup>194</sup> Cohn persistently failed to remember the details of his wife's handwriting on an envelope.<sup>195</sup>

As of *Bronston*, "evasive" testimony for contempt of court and for the obstruction of justice statute had meant but (1) false testimony: *Appel* (criminal contempt), *Bufalino* (conspiracy to obstruct); and (2), false denials of memory: *Appel*, *Lang*, *Battaglia*, *Bongiorno*, *Ex parte Hudgings*, *Hooley* (all criminal contempt), *Alo* (Section 1505), and *Cohn* (Section 1503), equated to a refusal to testify.

Since *Bronston*, "evasive" has been used similarly under Section 1503. The most influential obstruction opinion since *Bronston* is *United States v. Griffin*.<sup>196</sup> Griffin was questioned before a grand jury regarding persons he had mentioned in a conversation intercepted by the FBI relating to loansharking and currency smuggling. ". . . Griffin either flatly denied knowledge or relied on an inability to recall the facts about which he was questioned."<sup>197</sup> Judge Wisdom's opinion cited examples, *inter alia*, of "Know anything about? No sir"; "Not that I can recall, with him"; and repetitions of "No."<sup>198</sup> *Griffin* thus presented the same mix of false accounts and lies about recollection as those present in *Appel*.

*Griffin* was therefore the first opportunity for a Court of Appeals to consider false testimony under Section 1503 since *Bronston*. Since that time, the Fifth Circuit had rejected the *ejusdem generis* limitation of *Essex* so as to apply the Omnibus Clause with respect to non-testimonial obstruction in *United States v. Partin*<sup>199</sup> and *United States v. Howard*.<sup>200</sup> In *Griffin*, Judge Wisdom, writing for the Fifth Circuit, relied on an analogy to Partin's jury tampering to bring false testimony within the Omnibus Clause:

[U]sing threats or bribes to prevent a grand jury witness from testifying truthfully has the result of concealing and altering the nature of evidence. If such conduct consti-

194. See *United States v. Alo*, 439 F.2d 751, 753 (2d Cir. 1971).

195. See *United States v. Cohn*, 452 F.2d 881, 882-83 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972).

196. See generally *United States v. Griffin*, 589 F.2d 200 (5th Cir. 1979).

197. *Id.* at 202.

198. *Id.*

199. See generally *United States v. Partin*, 552 F.2d 661 (5th Cir. 1977) (conspiring to procure perjury).

200. See *United States v. Howard*, 569 F.2d 1331 (5th Cir. 1978) (applying limitation to sale of grand jury transcripts).

tutes an obstruction of the administration of justice, as we held in *Partin*, then so does testifying falsely; the result in either case is the same.<sup>201</sup>

The analogy to *Partin* was fortified with *Cohn*, the only other Court of Appeals case to date to apply Section 1503 to false testimony, and in particular to false denials of memory characterized as “evasive.” *Cohn*’s false denials of recall were thus precisely on point with Griffin’s testimony: “The blatantly evasive witness achieves this effect as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.”<sup>202</sup>

The Fifth Circuit well understood the significance of “evasive” to describe the “screen of feigned forgetfulness.” When rejecting Griffin’s argument that perjury alone was insufficient to trigger the Omnibus Clause, Judge Wisdom first addressed garden variety lying, and then noted the significance of the “screen of feigned forgetfulness:”

The perjurious witness can bring about a miscarriage of justice by imperiling the innocent or delaying the punishment of the guilty. Thus, had Griffin’s testimony been merely false, it might well have come under the terms of the omnibus clause of Section 1503, nonetheless. Such a case is not before us, however.<sup>203</sup>

Griffin’s testimony was not merely false, his failure to recall was evasive, and ultimately tantamount to a refusal to testify, as had been *Cohn*’s, as had been *Alo*’s, and as had been *Appel*’s:

The defendant has ignored the actual nature of his testimony. We find it impossible to differentiate a flat refusal to testify from an evasive answer or a falsehood such as Griffin’s: “No; I don’t know; Not that I can recall.” By falsely denying knowledge of events and individuals when questioned about them, Griffin hindered the grand jury’s attempts to gather evidence of loansharking activities as effectively as if he refused to answer the questions at all.<sup>204</sup>

The *Griffin* court noted that *Cohn* had emphasized concealment, rather than falsehood in locating false testimony within Sec-

201. *Griffin*, 589 F.2d at 203. (footnote omitted).

202. *Id.* (quoting *United States v. Cohn*, 452 F.2d 881, 884 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972)).

203. *Id.* at 204.

204. *Id.*

tion 1503: “The *Cohn* court, however, characterized the gist of the defendant’s offense as the concealment of knowledge from the grand jury rather than the injection of falsehood into the proceedings. And the indictment charged Cohn with evasive as well as false testimony.”<sup>205</sup> But then Judge Wisdom resolved the question as to whether perjurious statements, including false denials of memory, fell under the Omnibus Clause because they conceal evidence or falsify evidence:

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. In either event, the government must, and in this case did, charge in the indictment and prove at trial that the testimony had the effect of impeding justice.<sup>206</sup>

*Griffin* is thus harmonized with *Cohn*, consistent with the use of “evasive” to that point. Lies about not remembering have two natures. “No; I don’t know; Not that I recall” is evasive, in that a feigned failure of memory conceals knowledge, as does destroying documents. And it is false in that it blocked the flow of information, as does submitting a false document. Either nature is sufficient for obstruction, but neither nature applies to *true unresponsive statements*.

The harmonization between *Cohn* and *Griffin* as to whether false denials of any sort are obstructive because of concealment or because of falsehood was noted in *United States v. Caron*.<sup>207</sup> Caron sought dismissal on multiple grounds of four counts of perjury and obstruction of justice as to grand jury testimony given following a grant of immunity. The nature of his grand jury testimony is not given in the District Court’s opinion. In deciding whether perjurious testimony may constitute obstruction under Section 1503, the *Caron* court described the *Griffin* court’s reasoning from *Partin* and *Howard* forward to bring false testimony within Section 1503, *Essex* notwithstanding. In the course of that description, the *Caron* court recounted:

Finally, although the indictment in the *Griffin* case involved allegations that the defendant gave false testimony before a grand jury, the Court [*sic*] found any distinction

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205. *Id.* (emphasis added).

206. *Id.*

207. *United States v. Caron*, 551 F. Supp. 662, 668 (E.D. Va. 1982).



between “false” testimony and “evasive” testimony immaterial to the question whether the giving of testimony of either description could constitute obstruction of justice under § 1503. “In either event,” the Court [*sic*] stated, “the government must, and in this case, did, charge in the indictment and prove at trial that the testimony had the effect of impeding justice.”<sup>208</sup>

In so recounting, the *Caron* court made no change nor did it have occasion to modify *Griffin*'s definition of “evasive” testimony as false denials of recollection or knowledge. The *Caron* court did, however, remark in a footnote upon the relation of “evasive” testimony to other falsehoods in the context of both *Griffin* and *Cohn*. In arguing the tension between *Griffin* and *Essex* as to whether false testimony can constitute obstruction, the government had posited that *Cohn* supported *Griffin*:

However, the indictment in *Griffin* alleged only that the defendant gave false testimony, whereas in *Cohn*, the indictment additionally charged the defendant with giving evasive testimony, which more clearly obstructs a grand jury's investigation than does false testimony. Nevertheless, the analysis employed in *Cohn*, does lend support to the approach taken in *Griffin*.<sup>209</sup>

The observation that “evasive” testimony “more clearly obstructs a grand jury's investigation” than merely “false testimony” is original in articulation in *Caron*, but is undoubtedly at the core of the feigned forgetfulness cases equating testimonial amnesia to refusal to testify. Denial of memory or refusal to answer blocks off further avenues of inquiry, as distinct from false answers, which may be challenged, probed, and refuted with evidence. Nothing in the footnote's observation challenges or alters *Griffin*'s definition of “evasive” testimony as false forgetfulness.

*Griffin* and *Caron* were both cited in *United States v. Perkins*.<sup>210</sup> Perkins was an attorney for a bank who had represented members of the Hamilton family. Ruye Marshall Hamilton opened an account under the fictitious name “Sweetie Marshall” for the benefit of his daughter, Mrs. Hawkins, whose husband was an officer of the bank. After Mr. Hamilton's death, Mr. Hawkins noticed irregulari-

208. *Id.* at 668, *aff'd without opinion*, 722 F.2d 739 (4th Cir. 1983), *cert. denied* 465 U.S. 1103 (1984) (citing *Griffin*, 589 F.2d at 204).

209. *Id.* at 667 n.6 (citations omitted).

210. *See* *United States v. Perkins*, 748 F.2d 1519, 1526, 1528 (11th Cir. 1984).

ties in the “Sweetie Marshall” and other accounts. He and Perkins notified the FBI. A grand jury inquired about the ownership of and irregularities in the account. It was alleged that another family member had wrongfully assumed the name and control of the account for the purposes of receiving insurance reimbursement for losses to the account. Before the grand jury, Perkins was asked about the identity of “Sweetie Marshall” and the details of account transactions. The *Perkins* court gave the text of the indictment for conspiracy to obstruct justice under 18 U.S.C. § 371, which specified three overt acts, including the grand jury testimony. A portion of the testimony at issue concerned a failure to recall:

Q. Any 1099 that would have to go out from the bank showing interest posted each year, were they sent to your office?

A. The one was Sweetie Marshall’s; I knew about that one. . . .

Q. 1099s were sent to your office?

A. Yes.

Q. What did you do with them?

A. I think they just stayed there; I believe they did, at my office.

Q. You never forwarded them to Sweetie?

A. No, I don’t think I did. I might have, but I don’t recall right now, having done it.<sup>211</sup>

The *Perkins* court reviewed through *Griffin*, *Alo*, *Cohn*, and *Caron* the applicability of Section 1503 to both false testimony and evasive testimony, the latter defined by specific reference to Cohn’s “screen of feigned forgetfulness.”<sup>212</sup> Section 1503 thus applied to Perkins’ false statements,<sup>213</sup> including his evasive failure to recall: “A. No, I don’t think I did. I might have, but I don’t recall right now, having done it.”<sup>214</sup>

The Eleventh Circuit’s final observation on evasive testimony made it the government’s burden to prove obstruction for evasive testimony the same as for ordinary false testimony:

When false statements form the basis of the alleged obstruction, however, the government must prove that the statements had the effect of impeding justice. . . .

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211. *Id.* at 1522-23 n.7.

212. *See id.* at 1527-28.

213. *See id.* at 1528.

214. *See id.* at 1522 n.7.

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We find this rationale equally applicable to allegations of evasive testimony and thus conclude that when either false or evasive testimony is the basis of a section 1503 charge, the government must prove obstruction.<sup>215</sup>

The *Perkins* court made no modification to the definition of “evasive” testimony as feigned forgetfulness under Section 1503. Rather, it reinforced that understanding by explicit reference to *Griffin*, *Cohn*, and *Alo*.

Any doubt about the definition of “evasive” testimony as feigned forgetfulness was laid to rest by the Eleventh Circuit in *United States v. Williams*,<sup>216</sup> a Section 1503 case based upon flat factual denials unmixed with denials of memory. The defendants in *Williams* had testified as to any knowledge of thefts or under-deliveries in the maritime refueling business in a civil antitrust action. As a result of the testimony, the defendants were charged under RICO and Section 1503. The testimony across the board consisted largely of repeated denials: “No, sir.”<sup>217</sup> The defendants contended that perjury alone did not constitute obstruction under Section 1503. The Fifth Circuit revisited its decision in *Griffin*:

However, we did not determine in *Griffin* whether all knowingly false grand jury testimony *ipso facto* constitutes a violation of section 1503, although we intimated that it might, saying “had Griffin’s testimony been merely false, it might well have come under the terms of the omnibus clause of § 1503, nonetheless.” We did not reach that issue because we held that Griffin’s testimony was not only false but also “had the effect of impeding justice,” and that “his denials of knowledge had the effect of closing off venues of inquiry entirely.”<sup>218</sup>

The Fifth Circuit then gave the relation between false denials of fact and “evasive” false denials of memory:

As recited in that opinion, Griffin’s grand jury testimony on which his section 1503 conviction rested consisted in significant part of the same sort of short, flat, and whole-

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215. *Id.* at 1527-28 (citing *In re Michael*, 326 U.S. 224, 227-28 (1945); *United States v. Griffin*, 589 F.2d 200, 205 (5th Cir. 1979); *Caron*, 551 F. Supp. at 670).

216. *See United States v. Williams*, 874 F.2d 968, 976 (5th Cir. 1989).

217. *See, e.g., id.* at 977 n.26.

218. *Id.* at 980 (citation omitted) (citing *Griffin*, 589 F.2d at 204, 205).

sale false denials of knowledge as those of our appellants here. It is true that some other aspects of Griffin's testimony might more accurately be described as *evasive* or a *mere denial of memory*, rather than a flat, unequivocal denial of any knowledge. [Emphasis added.] However, we refused [in *Griffin*] to attach significance to that purported distinction:

"We find it impossible to differentiate a flat refusal to testify from an evasive answer or a falsehood such as Griffin's. . . . By falsely denying knowledge of events and individuals when questioned about them, Griffin hindered the grand jury's attempts to gather evidence of loansharking activities as effectively as if he refused to answer the questions at all."<sup>219</sup>

The Fifth Circuit confirmed this theory of obstruction more recently in *United States v. Brown*,<sup>220</sup> growing out of the Enron scandal. Brown was convicted of both perjury and obstruction on the basis of the same grand jury testimony. He argued that conviction for perjury did not necessarily make him guilty of obstruction.<sup>221</sup> Citing both *Griffin* and *Williams*, the *Brown* court noted that both "evasive" answers and "denials of knowledge" were "false" in those cases and hindered the grand jury for purposes of Section 1503 as effectively as if the witness refused to answer the questions at all.<sup>222</sup> Brown's attempt to require further proof of obstruction was precluded, though, by his conviction for perjury, so that his testimony, as in *Griffin* and *Williams*, was false.<sup>223</sup> Unlike Brown, however, Bonds was not convicted of perjury and Statement C was conceded to be true.

*Williams* and *Brown* are significant not only in confirming *Griffin*'s defining "evasive" testimony in terms of false denials of memory, but also in relating "evasive" testimony to false denials of knowledge, where the effect again is to conceal evidence so that further examination cannot uncover the truth. This is consistent with the Second Circuit's opinion as to false denials of knowledge in *United States v. Langella*.<sup>224</sup>

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219. *Id.* at 981 (second alteration in original) (emphasis added) (footnotes omitted) (quoting *Griffin*, 589 F.2d at 204).

220. 459 F.3d 509 (5th Cir. 2006).

221. *See id.* at 530-31.

222. *Id.* at 530-31.

223. *See id.* at 531.

224. 776 F.2d 1078 (2d Cir. 1985).

Gennaro Langella had been taken in a raid of a meeting of alleged organized crime figures. In three grand jury appearances, Langella denied knowing that anyone he knew was in the Colombo crime family, or how he met two individuals taken at the gathering, or what Carmine Persico, his friend of 30 years, did for a living, among other outright falsehoods.<sup>225</sup> The Second Circuit confirmed his convictions for perjury on the basis of his false testimony, and confirmed the obstruction charges as well:

The obstruction count of the indictment did not charge Langella only with making false statements. It also accused him of concealing evidence concerning Carmine Persico and the Brooklyn meeting. Several of Langella's answers on these topics were obviously evasive and constituted concealment of evidence. That the false testimony concerning Persico's presence was also a lie did not remove it from the scope of Section 1503.<sup>226</sup>

The Second Circuit described Langella's false denials and other falsehoods as evasive and obstructive in that they concealed evidence. Nothing in *Langella* alludes to any evasion based on truthful testimony in the sense of *Bronston*.

Thus flat denials of memory or flat denials of knowledge in a responsive answer foreclose the examiner's ability to probe for the truth. There is nothing to cross-examine. These flat denials of knowledge or memory are distinct from the "evasive," truthful non-responsive answers considered in *Bronston*, where the very non-responsiveness signals the alert questioner to probe for more. If further questioning elicits a false, responsive denial of memory, knowledge, or alleged substantive fact, then the sanction is appropriately either perjury, because it is false and material, or obstruction, because it is false and forecloses further inquiry. If the answer is non-responsive, false and material, then perjury is the sanction. If the answer is non-responsive, false, and forecloses further inquiry, then obstruction is the sanction. But, as in *Bonds*, if the answer is non-responsive and true, then the responsibility of the examiner is to probe the more.

Further incidental descriptions of testimony as evasive do not challenge *Griffin's* usage of the word. In one appeal from convictions for obstruction, witness tampering, and conspiracy, it was the

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225. *See id.* at 1079-80.

226. *Id.* at 1081 (citing *United States v. Cohn*, 452 F.2d 881, 883-84 (2d Cir. 1971)).

defendants-appellants rather than the court who described the testimony of the prosecution's witness as "evasive."<sup>227</sup> This characterization appears to relate to refusals to answer, false denials of memory, and other falsehoods rather than any truthful statements. Significantly, the Seventh Circuit attached no significance to the defendants' allegations of evasiveness.

The defendants also claim that Oliveros gave evasive answers to questions and was shown to have lied repeatedly on the stand, such that their convictions rest upon "tainted" testimony. . . . As to the instances where Oliveros refused to answer questions, when defense counsel protested at trial that Oliveros' testimony and cross-examination was evasive the judge and the prosecutor both instructed the witness to answer without hesitation. Defense counsel cites several instances where Oliveros claimed that he could not remember certain facts. However, most of these situations involved collateral matters, and in those instances that may have had a bearing on the charges alleged in the indictment, defense counsel was not restrained from arguing Oliveros' credibility to the jury.<sup>228</sup>

A defendant acting *pro se* in a trial for attempting to escape was convicted of criminal contempt for his refusal to cooperate with the court at any stage of court proceedings.

From the very beginning of the proceedings, the defendant determined upon a policy of obstructionism in order to delay his trial. His strategy was not to engage in violent or outrageous conduct but to employ a type of passive resistance through noncooperation.<sup>229</sup>

This included refusing to answer questions as a trial participant (as distinct from sworn testimony as a witness) and causing the judge to repeat portions of the *voir dire* process by claiming he had not been listening to the jurors.<sup>230</sup> The Third Circuit characterized his statements during *voir dire* as well as his tactics as a whole as "evasive,"<sup>231</sup> and described an answer to the judge as "mislead-

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227. See *United States v. Rovetuso*, 768 F.2d 809, 818 (7th Cir. 1985).

228. *Id.* (footnote omitted) (citing Trial Transcript at 1231–33, 1243–44).

229. *United States v. Proffitt*, 498 F.2d 1124, 1125 (3d Cir. 1974).

230. See *id.* at 1126–27.

231. *Id.* at 1126.

ing.”<sup>232</sup> There was no sworn testimony during this process, true, false, evasive or otherwise. Thus, the obstruction from the “evasive” and “misleading” statements arose from Proffitt’s role as a *pro se* advocate, rather than as a witness under oath.<sup>233</sup>

There are yet more tenuous references to “evasive” testimony on a few occasions. The U.S. District Court for Connecticut alluded to the “false and evasive” testimony in *Bufalino* without further explanation or description in *United States v. Cohen*.<sup>234</sup> In one Section 1503 case, “The Government’s proof in the instant case demonstrated that these statements were false and evasive and designed to obstruct the grand jury’s investigation.”<sup>235</sup> The Second Circuit did not further describe or specify the testimony. The Second and Fifth Circuits have supported a trial court’s ability to admonish a witness for “evasive” testimony, without further defining what that testimony had been.<sup>236</sup>

Finally, outside Section 1503, the Ninth Circuit characterized a defendant’s testimony at a suppression hearing to be “evasive” in that he tried to claim that the word “they” in his recorded telephone calls from a detention center referred to his attorneys rather than the authorities.<sup>237</sup> His purpose was to leave a “false impression” that he lacked of notice that his calls were monitored, his own recorded statements notwithstanding, so as to challenge the enhancement of his sentence for kidnapping. Whatever his tone or attempted subterfuge at the suppression hearing, the trial court found the testimony to be false, which the Ninth Circuit upheld.<sup>238</sup> As “evasive” here refers to testimony found false by the trial judge, the settled meaning of “evasive” under Section 1503 is left undisturbed by a tangential description in a kidnapping case.

In summary, “evasive” testimony has been identified in two senses. *Bronston*, speaking to all sworn testimony by witnesses, makes truthful non-responsive answers the occasion for further

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232. *Id.* at 1127.

233. *See generally* Clark v. United States, 289 U.S. 1 (1933) (describing contempt charge for knowingly misleading statements, as well as false statements, rooted in contemnor’s role as prospective juror in *voir dire*, rather than as sworn witness in trial.)

234. *See* United States v. Cohen, 202 F. Supp. 587, 589 (D. Conn. 1962) (citing United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960)).

235. United States v. Kanovsky, 618 F.2d 229, 230 (2d Cir. 1980).

236. *See* United States v. Minkoff, 137 F.2d 402, 405 (2d Cir. 1943); United States v. Boyle, No. 95-20532, 1996 WL 512091, at \*6 (5th Cir. Aug. 28, 1996) (per curiam).

237. *See* United States v. Sherwood, 98 F.3d 402, 415 (9th Cir. 1996).

238. *See id.*

probing, not prosecution, even if misleading by implication. The non-responsiveness is the signal to the alert examiner to press the inquiry.

On the other hand, evasive false denials of knowledge or recall foreclose any such further inquiry and are subject to prosecution both as perjury, because they are false, or as obstruction, because they block further examination. This pattern of usage for “evasive” testimony manifests the federal courts’ observance of *Bronston*’s instruction until *Bonds*. In Justice Scalia’s terms, the indeterminacy of “evasive” and “misleading” without a statutory definition is remedied by forty years of narrowing context to settle their legal meanings with regard to evasion by truthful non-responsive answers under *Bronston* and to evasion by feigned denial of memory or knowledge tantamount to a refusal to testify in obstruction and contempt cases.<sup>239</sup>

In *Bonds*, neither the District Court nor Ninth Circuit panel examined the foundations of the quotations used to support the application of the Omnibus Clause to truthful unresponsive testimony. Citations, then, to *Griffin*’s equation of evasive testimony with false testimony under Section 1503, as well as to *Caron*’s corollary that evasive testimony is the more obstructive, must be made with reference to their contexts, rather than as superficial soundbites in the vernacular, heedless of the underlying principles, narrowing contexts, and settled legal meaning.

## VIII. BONDS AT TRIAL AND BEFORE THE NINTH CIRCUIT

### A. *Bronston* in Perjury Cases in the Ninth Circuit

Judge Ely of the Ninth Circuit anticipated the principles of *Bronston* in a dissent in *United States v. Cook* immediately before *Bronston* was decided.<sup>240</sup> The Ninth Circuit later revisited *Cook* and reversed the conviction, adopting *Bronston*: “Fairly interpreted, *Bronston* stands for the precept that a perjury conviction cannot be based on answers which are literally true, even though false information is conveyed by implication.”<sup>241</sup>

The development of the *Bronston* doctrine in Ninth Circuit perjury cases is fairly set forth in *United States v. Sainz*, where an INS officer testified before a grand jury about two border crossing inci-

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239. See *supra* note 164 and accompanying text.

240. See *United States v. Cook*, 497 F.2d 753 (1972) (Ely, J., dissenting).

241. *United States v. Cook*, 489 F.2d 286, 287 (9th Cir. 1973).



dents at Nogales, Arizona.<sup>242</sup> The Ninth Circuit reproved the prosecutor for asking only general questions of the witness about undefined “procedures” at the border, while yet claiming that the witness had committed perjury by lying about particular questions that were never asked.<sup>243</sup> The Ninth Circuit endorsed *Bronston’s* premise that “the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.”<sup>244</sup> The court invoked *Bronston* to describe the perjury statute precisely as the obstruction statute should be described:

The perjury statute and its goal of truth in our system of justice is served by fostering truthful answers to precise questions, not by penalizing unresponsive answers to unclear questions. Moreover, “[i]t is no answer to say that here the jury found that [the defendant] intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner.”<sup>245</sup>

The *Sainz* court concluded that “literally truthful but apparently unresponsive” answers narrowed by “further questioning” are not examples of “the corruption of our system of justice through perjury,” but rather show “our system working properly.”<sup>246</sup>

### B. Testimonial Obstruction in the Ninth Circuit

The Ninth Circuit’s foundation case for Section 1503 was *Haili v. United States*, which had used the doctrine of *ejusdem generis* to exclude meetings between two convicted felons in violation of probation terms from the scope of conduct prohibited by the Omnibus Clause.<sup>247</sup> *Haili’s* view of *ejusdem generis*, in turn, was relied upon in *Essex* to exclude false testimony from the Omnibus Clause.<sup>248</sup> This rationale was rejected by the Second Circuit in *United States v. Alo*<sup>249</sup> and *United States v. Cohn*,<sup>250</sup> which included false testimonial ob-

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242. See *United States v. Sainz*, 772 F.2d 559, 562-64 (9th Cir. 1985).

243. *Id.* at 562.

244. *Id.* (quoting *Bronston v. United States*, 409 U.S. 352, 359 (1973)).

245. *Id.* at 564 (alterations in original) (quoting *Bronston*, 409 U.S. at 359).

246. *Id.*

247. See *Haili v. United States*, 260 F.2d 274774 (9th Cir. 1958).

248. See *United States v. Essex*, 407 F.2d 214 (9th Cir. 1969).

249. See *United States v. Alo*, 439 F.2d 751 (2d Cir. 1971).

250. See *United States v. Cohn*, 452 F.2d 881 (2d Cir. 1972)), *cert. denied*, 405 U.S. 975 (1972).

struction, specifically “evasive” false denial of memory, within the Omnibus Clause. Subsequent courts followed *Alo* and *Cohn* rather than *Haili* and *Essex*.<sup>251</sup>

The Ninth Circuit re-examined *Haili* and *ejusdem generis* and took *Griffin* as a model for Section 1503 in *United States v. Rasheed*,<sup>252</sup> wherein the co-defendant Phillips was convicted of obstruction for destroying records. Phillips claimed that the Ninth Circuit had adopted *ejusdem generis* in *Haili* to limit the reach of the Omnibus Clause to conduct within the enumerated prohibitions in the first part of Section 1503. The *Rasheed* court resolved the conflict between *ejusdem generis* and a broad reading of the Omnibus Clause by interpreting the word “corruptly” as having the “purpose of obstruction justice.”<sup>253</sup>

Using this definition of “corruptly,” the destruction or concealment of documents can fall within the prohibition of the statute. This holding does no violence to our rule that the catch-all provision of section 1503 is limited by the prior specific prohibitions of the statute. The act of destroying or concealing subpoenaed documents is “similar in nature,” . . . to the enumerated acts. The destruction or concealment of subpoenaed documents results in the improper suppression of evidence, and thus the influencing, obstructing and impeding of judicial proceedings, just as much as does the intimidation of a witness. . . . That one act suppresses testimonial evidence, while the other act suppresses real evidence is of no importance.<sup>254</sup>

The *Rasheed* court thus anchored the place of document destruction within the Omnibus Clause to the precedent of testimonial obstruction in the Second and Fifth Circuits. Paradoxically, the Second and Fifth Circuits had anchored testimonial obstruction within the Omnibus Clause by analogy to the document destruction cases.

Contemporaneous with the Bonds prosecution, another BALCO case was before the same court involving Olympic and pro-

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251. See, e.g., *United States v. Griffin*, 589 F.2d 200 (5th Cir. 1979).

252. 663 F.2d 843 (9th Cir. 1981).

253. *Id.* at 852.

254. *Id.* (internal citations omitted) (citing *Griffin*, 589 F.2d 200; *Cohn*, 452 F.2d at 883-84; *United States v. Solow*, 138 F. Supp. 812, 815 (S.D.N.Y. 1956); *United States v. Faudman*, 640 F.2d 20, 23 (6th Cir. 1981) (alteration and destruction of corporate records)).

fessional cyclist Tammy Thomas.<sup>255</sup> Evidence from the BALCO investigation showed that Thomas had received norbolethone, an anabolic steroid, from Patrick Arnold, the same source from whom BALCO had received “the clear.” When asked if Arnold had given her anything other than the legal supplement 1-AD, Thomas “denied ever getting any other ‘products’ from Arnold, ever ‘tak[ing] anything that Arnold gave [her],’ and ‘ever tak[ing] anabolic steroids.’”<sup>256</sup> Thomas’ answers were responsive to the question and false, and thus outside the ambit of *Bronston*. As the jury by special verdict found the false testimony to have obstructed justice, *Thomas* is the most recent example of applying the Omnibus Clause to false testimony.<sup>257</sup>

However, the very first testimonial obstruction case within the Ninth Circuit, *United States v. Spalliero*,<sup>258</sup> had reservations about following *Griffin* to bring testimony within the Omnibus Clause.<sup>259</sup> Spalliero was indicted for multiple counts of perjury and one count of obstruction based on his grand jury testimony. The *Spalliero* court criticized the questioning and, in fact, dismissed one perjury count:

The witness who gives a responsive but ambiguous answer may find himself the defendant in a perjury case because the examiner failed to follow-up on his initial questions. The law requires the witness to tell the truth; it does not shoulder the witness with the burden of aiding a sloppy questioner.<sup>260</sup>

As for the count of testimonial obstruction, the *Spalliero* court was compelled to follow *Rasheed* as Ninth Circuit authority, but found that reasoning troubling in light of the Supreme Court’s instruction for testimony in *Bronston*. Spalliero gave grand jury testimony regarding a loan from Vito Spillone, who was suspected of loansharking:

In his testimony, defendant declared that he did not give Mr. Spillone a note or I.O.U. Defendant testified that he showed Spillone the vehicle ownership certificate or “pink slip” for the tow truck and left the pink slip on a table at

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255. See generally *United States v. Thomas*, 612 F.3d 1107 (9th Cir. 2010).

256. *Id.* at 1111 (alterations in original).

257. See *id.* at 1129.

258. 602 F. Supp. 417 (C.D. Cal. 1984).

259. See *id.* at 425.

260. *Id.* at 422.

the place where he met with Spillone. Defendant declared that he forgot to pick up the pink slip. Count VI of the indictment charges that defendant intentionally left the pink slip with Spillone to act as collateral for the loan or loans made by Spillone.<sup>261</sup>

The obstruction count of Spalliero's indictment described his testimony as "intentionally evasive, false and misleading and designed to conceal defendant's true knowledge of the facts from the Grand Jury."<sup>262</sup> Spalliero argued the *ejusdem generis* limitation on the Omnibus Clause derived from *Haili*. Though the District Court followed *Rasheed's* invocation of *Griffin* and *Cohn*, Judge Rymer voiced strong doubts, given the instruction from *Bronston*:

I hesitate to permit the government to go forward on Count VI for several reasons. First, to the extent that the count charges the defendant with making false statements, I do not understand why the government should not be made to proceed under the perjury statutes and established judicial interpretations of 18 U.S.C. § 1623. Second, to the extent that defendant's testimony is not perjurious but rather evasive, or misleading, I think that interpreting § 1503 to obtain a result unobtainable under the perjury statute is ill-advised. The dangers and problems of prosecuting persons for evasive testimony were discussed by the United States Supreme Court in *Bronston v. United States*.<sup>263</sup>

The District Court observed that *Bronston* was not confined to cases brought under Section 1621 or 1623, but applied more generally across testimonial statutes to protect witnesses:

That case did not simply overturn a perjury conviction on the ground that a false implication does not literally fall under the language of the perjury statute which confines an offense to the witness who "willfully . . . states . . . any material matter which he does not believe to be true." Instead, *the Court looked to limitations dictated by the important policy that "the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying."* . . . Although a conviction under § 1503 may require proof of intention to impede justice thereby excluding the misled-

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261. *Id.* at 425.

262. *Id.*

263. *Id.* at 426.

ing or non-responsive statement, innocently made, *the fear of possible prosecution for evasive or misleading testimony under § 1503 will burden every witness before a grand jury—even those who are in no position to gauge the effect of their statements on a grand jury investigation about which they have little or no information.*<sup>264</sup>

The better remedy, as *Bronston* had emphasized, was better questioning:

In *United States v. Cohn*, 452 F.2d 881 (2d Cir.1971), a grand jury witness was charged with violation of § 1503 for testifying repeatedly *that he could not recall certain facts* [emphasis added]. At trial his statements were proved to be *false and evasive*. [Emphasis added.] By contrast, in this case the government is pursuing a witness who answered the question. If the witness' answers are false then the government could charge perjury. If the answers are incomplete or give a misleading impression, then the government could have remedied the situation at the time of the investigation *by asking additional questions* [emphasis added] to pin down the defendant about whether or not he *intentionally* [emphasis in original] left the pink slip on the table or intended the pink slip to be collateral for a loan. In the *Cohn* case, the government's questions were met with "I don't recall." Additional questions by the examiner could not remedy the situation.<sup>265</sup>

The *Spalliero* court was thus aware of the contexts of the two types of "evasive" testimony. The evasive testimony of denied recall, as in *Cohn*, leaves the questioner without a remedy for discovering the truth. Otherwise, "the government could have remedied the situation at the time of the investigation by asking additional questions,"<sup>266</sup> as in *Bronston*, thus mitigating the witness's fear of hair-trigger penalties that themselves hinder the search for truth.

Having expressed these reservations, I am nevertheless constrained to acknowledge that the Ninth Circuit appears to embrace the reasoning in *United States v. Griffin*

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264. *Id.* (first and second alterations in original) (emphases added) (quoting *Bronston v. United States*, 409 U.S. 352, 359 (1973)).

265. *Id.*

266. *Id.*

and *United States v. Cohn*. . . . Accordingly, defendant's motion to dismiss Count VI of the indictment is denied.<sup>267</sup>

Thus with the precedent of *Rasheed* purporting to follow *Griffin*, with the Ninth Circuit having applied Section 1503 to false testimony, yet with the expressed doubts of Judge Rymer toward applying Section 1503 to testimony squarely within *Bronston*, the *Bonds* courts took up whether truthful, non-responsive, albeit misleading testimony is chargeable under the Omnibus Clause of Section 1503.

### C. *Bonds v. Bronston*

During the trial and through the appeal, both the government and Bonds took alternate, contingent, and necessarily inconsistent positions characterizing Statement C as responsive or non-responsive, relevant or not relevant, true or false, "evasive" or "rambling." The impetus to cover all the bases on both sides arose from the anomalous posture of a witness being prosecuted for making true statements under oath.

To be sure, whether Bonds told the truth in Statement C is a bone of frantic contention, and it is hardly the purpose of this article to make a claim either way. Nonetheless, a confluence of factors places the applicability of Section 1503 to a witness's true, but allegedly misleading statements at the core of the case. Salient among them is the government's concession cited in Bonds' Reply Brief in Support of Motions for Judgment of Acquittal and/or a New Trial on Count Five:

In summing up its argument for submitting all of the lettered statements to the jury, the government declared: "[W]e would have charged him as a 1623 count if we were saying these are all false. These are in the evasive and/or misleading category."

. . . .

. . . The government neither suggested to the Court that Statement C was false nor cited to the facts supporting the proposition the statement was false rather than merely evasive. Nor did it [the government] argue to the jury in closing that any portion of Statement C was false, much less that Mr. Bonds had lied when he said "That's what keeps our friendship." Rather, to the direct contrary,

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267. *Id.* (citing *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981)).

AUSA Nedrow stated as to Count Five that Mr. Bonds “obstructed justice . . . by citing his friendship with Greg Anderson and by providing *not outright false* testimony . . . .”<sup>268</sup>

Judge Illston’s Order Denying Bonds’ Motions to Acquit and for a New Trial rejected his argument that “the jury’s guilty verdict cannot stand because section 1503 does not proscribe obstructing justice by means of truthful but evasive answers.”<sup>269</sup> Yet Judge Illston also rejected the government’s argument that Statement C was false, in part because “there are other ways to understand defendant’s testimony” so that Statement C was not “necessarily” false, and in part because “the government did not argue this reading to the jury.”<sup>270</sup>

The government’s brief to the Ninth Circuit three-judge panel renewed the argument that Statement C was false,<sup>271</sup> but argued in the alternative: “Even if Bonds actually considered his relationship with Anderson to be a friendship, and truly did not generally ‘get into other people’s business’ as a result of growing up with a famous father, these stitches of truth were used to construct a lie.”<sup>272</sup>

The Ninth Circuit panel held that “[t]he cases interpreting § 1503 support our conclusion that misleading or evasive testimony that is factually true can obstruct justice.”<sup>273</sup> In so holding, the Ninth Circuit panel creates a paradox between the illimitable scope of the Omnibus Clause of 18 U.S.C. § 1503 and the carefully drawn limits upon prosecuting testimony under 18 U.S.C. §§ 1621 and 1623 under the *Bronston* doctrine.<sup>274</sup>

The unanimous *Bronston* Court observed that 18 U.S.C § 1621 proscribed only material statements that the witness “does not believe to be true.”<sup>275</sup> The redress for non-responsive but true statements that may conceal other truths or imply falsehoods rests in the adversarial process. Non-responsive answers should place alert counsel on notice of possible deceit, discoverable upon probing,

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268. Defendant’s Reply in Support of Motions for Judgment of Acquittal and/or a New Trial, *supra* note 5, at 8 (first alteration in original)(emphasis added).

269. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 11-12.

270. *Id.* at 12 n. 5.

271. See Brief for United States as Appellee, *supra* note 7, at 26-29.

272. *Id.* at 29-30.

273. United States v. Bonds, 730 F.3d 890, 895 (9th Cir. 2013).

274. See *Bronston* v. United States, 409 U.S. 352 (1973).

275. *Id.* at 357.

precise questioning. The quality of counsel in adversarial questioning serves justice better than draconian penalties, which chill the witness's willingness to venture anything, let alone the whole truth.<sup>276</sup>

It is the responsibility of the lawyer to probe; testimonial interrogation and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.<sup>277</sup>

Thus, literally true non-responsive statements have been held beyond the scope of either of the federal perjury statutes, 18 U.S.C. § 1621 and 18 U.S.C. § 1623.<sup>278</sup> Until *Bonds*, no true statement by a witness, responsive or otherwise, had been held to incur culpability under the federal obstruction statute, 18 U.S.C. § 1503. While false testimony has been held to violate Section 1503,<sup>279</sup> *Bonds* represents the first time that Section 1503 has been used to evade the *Bronston* doctrine. The anomaly of prosecuting literally true, non-responsive statements accounts for the inconsistent arguments in the parties' briefs. The prosecution first concedes that Statement C is true, and then claims it is false. *Bonds* claims Statement C is responsive, and then claims it is merely rambling. These inconsistencies betray searches for a standard for culpability where there is none to be found. This lack of a clear standard creates the conditions for arbitrary application of the statutes at the heart of protecting the adversary process.

Though couched in terms of Section 1503, the Ninth Circuit panel's opinion in *Bonds* sets a collision course with the *Bronston* doctrine under Sections 1621 and 1623 and, if affirmed, threatens *Bronston's* continued viability and undermines the intent of Congress in enacting the perjury statutes. The Ninth Circuit panel expressly predicates its Section 1503 analysis upon a premise rejected by *Bronston* as to Section 1621.

*Bonds* claims that he could not have been convicted of obstructing the grand jury's investigation with an answer

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276. See *id.* at 358-59.

277. *Id.*

278. See, e.g., *id.* at 362; *United States v. Earp*, 812 F.2d 917, 919-20 (4th Cir. 1987).

279. See, e.g., *United States v. Cohen*, 202 F. Supp. 587, 589 (D. Conn. 1962).



that was misleading or evasive, no matter how far removed that answer was from the question asked, unless the answer was false. According to Bonds, because his response in Statement C was that he was a “celebrity child” was factually true, his conviction should be reversed. The problem is that while Bonds was a celebrity child, that fact was unrelated to the question, which asked whether Anderson provided Bonds with any self-injectable substances. When factually true statements are misleading or evasive, they can prevent the grand jury from obtaining truthful and responsive answers. They may therefore obstruct and impede the administration of justice within the meaning of the federal criminal statute, 18 U.S.C. § 1503. . . .<sup>280</sup>

By contrast, the *Bronston* Court concluded:

It may well be that petitioner’s answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the “questioner’s acuity” and not by a federal perjury prosecution.<sup>281</sup>

Thus any “non-responsive” true testimony excluded from culpability for perjury under *Bronston* is now made criminal as an obstruction under the Omnibus Clause of Section 1503. As the *Bonds* panel illustrates:

We can easily think of examples of responses that are true but nevertheless obstructive. Consider a situation where a prosecutor asks a grand jury witness if the witness drove the getaway car in a robbery. The witness truthfully responds, “I do not have a driver’s license.” This response would be factually true, but it could also imply that he did not drive the getaway car. If the witness did in fact drive the getaway car, his answer, although not in itself false, would nevertheless be misleading, because it would imply that he did not drive the getaway car. It could also be deemed evasive since it did not answer the question.<sup>282</sup>

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280. *United States v. Bonds*, 730 F.3d 890, 894-95 (9th Cir. 2013). . .

281. *Bronston*, 409 U.S. at 362.

282. *Bonds*, 730 F.3d at 895.

A more precise analogy to Bronston's testimony cannot be articulated:

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.<sup>283</sup>

To paraphrase the Ninth Circuit panel:

This response would be factually true, but it could also imply that he did not [have a personal Swiss account]. If the witness did in fact [have a personal Swiss account], his answer, although not in itself false, would nevertheless . . . be deemed evasive since it did not answer the question.<sup>284</sup>

Post-*Bonds*, the witness who explains, who muses, who rambles from habit, who verbally searches her own recollection as she grapples with what the question requires is at peril of criminal culpability under Section 1503. Among the alarming consequences of *Bonds* is that the witness who in her mind attempts to give context in which the truth as she believes it may be understood is chilled by the threat of prosecution. Bonds' own alleged obstruction in Statement C is described by the government in its Opposition to Defendant's Motion for Judgment of Acquittal and/or a New Trial on Count Five:

AUSA Nedrow asked if Anderson ever gave the defendant anything requiring a syringe to inject himself with. Exh. 37 at 42. This was a "yes or no" question. But instead of giving a "yes or no" answer, the defendant evaded the question by talking about how only his personal doctor touched him, and launched into a distracting explanation of how a person (*i.e.*, Anderson) could only be friends with him because "we don't get into each others' personal lives," "he knows . . . don't come to my house talking baseball," and "I don't talk about his business." *Id.* And the defendant had learned this approach to friendships because he had grown up with a famous father. *Id.* The diversion tactic succeeded to some degree, as the prosecutor

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283. *Bronston*, 409 U.S. at 354.

284. *See Bonds*, 730 F.3d at 895.

responded, “Right.” *Id.* AUSA Nedrow was ready to move on to other areas of questioning without having ever received an answer to the injection question. Exh. 37 at 43. . . . The defendant only answered the injection question when AUSA Nadel interceded and refocused the discussion on injections. Exh. 37 at 43-44.<sup>285</sup>

The government claims that the obstruction arose from the necessity of undertaking the very burden imposed by *Bronston*: When AUSA Nedrow had been lulled into an acquiescent “Right,” the alert AUSA Nadel was obliged to pursue the question that the distracted AUSA Nedrow had abandoned. Were that the case, *Bronston* teaches that this would have been AUSA Nadel’s duty in the face of a witness proffering illusions of candor, even if AUSA Nedrow’s vigilance had failed:

The cases support petitioner’s position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the question—so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry. . . .

. . . .

. . . Though perhaps a plausible argument can be made that unresponsive answers are especially likely to mislead, any such argument must, we think, be predicated upon the questioner’s being aware of the unresponsiveness of the relevant answer. Yet, if the questioner is aware of the unresponsiveness of the answer, with equal force it can be argued that the very unresponsiveness of the answer should alert counsel to press on for the information he desires. It does not matter that the unresponsive answer is stated in the affirmative, thereby implying the negative of the question actually posed; for again, by hypothesis, the examiner’s awareness of the unresponsiveness should lead him to press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury.<sup>286</sup>

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285. United States’ Opposition to Defendant’s Motion for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 21, at 14 (second alteration in original) (footnote omitted) (quoting Bonds Testimony, *supra* note 14, at 42-44).

286. *Bronston*, 409 U.S. at 360-62 (footnote omitted) (citations omitted).

Testimony before a grand jury is *ex ante* neither a Section 1623 nor a Section 1503 case. Yet, post-*Bonds*, every witness faces a paradox between Section 1503 and the perjury statutes. The government's contention in *Bonds* is that the Omnibus Clause of Section 1503 turns *Bronston* on its head. The burden on the questioner corollary to the perjury statutes is the very obstruction which imposes culpability on the same witness under the Omnibus Clause. Clearly, such a reading of Section 1503 cannot stand alongside the *Bronston* reading of 1621 and 1623.

But the more fundamental import of the government's description of the obstruction in the trial brief is revealed by the actual course of questioning. Falsehood as an element of perjury or obstruction may be tough to prosecute, but it is tangible to the defendant and tractable for the jury. Proving truthful testimony to be delaying, distracting, and obstructive is as confusing to the government as it is to the witness, let alone the jury.

For example, AUSA Nadel's purported intervention to rescue a derailed AUSA Nedrow *never happened*. A review of the relevant transcript given in Part II (42:5-45:5),<sup>287</sup> reveals six related questions, two by AUSA Nedrow (42:5-6 and 43:9-12),<sup>288</sup> three by AUSA Nadel (43:19-23, 44:4-6, and 44:14-16),<sup>289</sup> and a resumption by AUSA Nedrow (44:18-21).<sup>290</sup> The first question by AUSA Nedrow inquired as to whether Greg Anderson had given Bonds a substance that required self-injection: "Did Greg ever give you anything that required a syringe to inject yourself with?" (42:5-6)<sup>291</sup>

Bonds responded that only his own doctor "touched" him, that he and Anderson did not get into each other's "business" (42:7-16), and then asked AUSA Nedrow, "You know what I mean?" (42:16).<sup>292</sup> AUSA Nedrow responded "Right," (42:17)<sup>293</sup> affirming that Nedrow did know what Bonds meant. The "Right" could not under the circumstances reasonably lead anyone to imagine that Nedrow had come to Bonds' point of view, but that Nedrow, as an alert prosecutor ought, understood what Bonds meant. AUSA Nedrow's "Right" affirms his own alertness to Bonds' statement

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287. Bonds Testimony, *supra* note 14, at 42:5-45:5.

288. *Id.* at 42:5-6, 43:9-12.

289. *Id.* at 43:19-23, 44:4-6, 44:14-16.

290. *Id.* at 44:18-21. Unless otherwise indicated, all references to the Bonds' grand jury testimony by page and line are from Bonds Testimony, *supra* note 14, Bonds at 42:5-45:5.

291. *Id.* at 42:5-6.

292. *Id.* at 42:7-16.

293. *Id.* at 42:17.

rather than any “diversion tactic [which] succeeded to some degree.”<sup>294</sup>

Bonds continued about Anderson’s friendship, along with two examples of not getting into one another’s business. The first was his own history as a “celebrity child.” (Statement C) (42:18-23).<sup>295</sup> The second example concerned his wife’s privacy, then a second reference to his father, concluding, “Just leave it alone. You want to keep your friendship, keep your friendship.”(42:24-43:8).<sup>296</sup> Bonds’ entire response to AUSA Nedrow’s self-injectable substance question, (42:5-6)<sup>297</sup> including AUSA Nedrow’s interjection of “Right,” requires between 100 and 120 seconds to read aloud and deliberately. (42:7-43:8).<sup>298</sup> But the government alleged that this interval was enough to derail AUSA Nedrow:

AUSA Nedrow was ready to move on to other areas of questioning without having ever received an answer to the injection question. Exh. 37 at 43. The defendant only answered the injection question when AUSA Nadel interceded and refocused the discussion on injections. Exh. 37 at 43-44.<sup>299</sup>

But lines 43:9-22 reveal otherwise. AUSA Nedrow was neither diverted, forgetful, nor ready to move on. AUSA Nedrow was on top of his game because he *did* “know what [Bonds] mean[t].” (42:16)<sup>300</sup> As Bonds’ Reply Brief in Support of Motions of Acquittal and New Trial observed:

To begin, the government baldly misrepresents the record. Immediately after Mr. Bonds completed his “Statement C” answer, it was AUSA Nedrow, not Nadel, who repeated the self-injection question, which Mr. Bonds answered directly and unequivocally ([Bonds Grand Jury Testimony], at 43). “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

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294. See United States’ Opposition to Defendant’s Motion for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 21, at 14.

295. Bonds Testimony, *supra* note 14, at 42:18-23.

296. *Id.* at 42:24-43:8.

297. *Id.* at 42:5-6.

298. See *id.* at 42:7-43:8.

299. United States’ Opposition to Defendant’s Motion for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 21, at 14 (citing Bonds Testimony, *supra* note 14, at 43-44).

300. Bonds Testimony, *supra* note 14, at 42:16.

that ever happen? A. No.”) Only then did AUSA Nadel interject a question about whether anyone other than his doctor had injected Mr. Bonds. (*Id.*)<sup>301</sup>

AUSA Nedrow did precisely what *Bronston* requires when faced with a non-responsive answer: “[B]y hypothesis, the examiner’s awareness of the unresponsiveness should lead him to press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury.”<sup>302</sup> Alert to Bonds’ unresponsiveness, AUSA Nedrow reframed his initial question (43:9-12),<sup>303</sup> identical in content with his first about Bonds’ shaving received a self-injectable substance (42:5-6),<sup>304</sup> except that the reframed question identified the substance more precisely and included Conte as a potential supplier (43:9-12).<sup>305</sup> AUSA Nedrow got a direct answer: “No.” (43:13)<sup>306</sup>

Only upon eliciting Bonds’ direct answer was AUSA Nedrow ready to move on: “Okay. At his time, Mr. Bonds, the grand jury has—. . . .” (43:14-15).<sup>307</sup> At this point, AUSA Nadel intervened, not to rescue AUSA Nedrow, who had persevered with precision, but to ask a separate line of questions, not about *what self-injectable* substance Bonds had received, but about *who* had ever personally *intravenously injected or drawn from Bonds* any substance, be it drug or blood. (43:23, 44:4-6, 44:14-16).<sup>308</sup> AUSA Nadel took his cue for his questions from the very answer that Bonds had given about having only his own physician touch him. (42:7).<sup>309</sup> It is difficult to characterize AUSA Nadel’s intervention as “refocusing” AUSA Nedrow to further pursue whether Bonds received a self-injectable substance, since that question had been asked and answered directly. (43:13).<sup>310</sup> Bonds’ answer did not distract AUSA Nedrow to any degree from his purpose, but rather inspired AUSA Nadel to launch his own distinct line of inquiry:

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301. Defendant’s Reply in Support of Motions for Judgment of Acquittal and/or a New Trial, *supra* note 5, at 4 (citing Bonds Testimony, *supra* note 14, at 43).

302. *See Bronston*, 409 U.S. at 362.

303. *See Bonds Testimony, supra* note 14, at 43:9-12.

304. *See id.* at 42:5-6.

305. *See id.* at 43:9-12.

306. *Id.* at 43:13.

307. *Id.* at 43:14-15.

308. *See id.* at 43:22-23, 44:4-6, 44:14-16.

309. *See id.* at 42:7.

310. *See id.* at 43:13.

AUSA Nadel: If I could just go back to Mr. Nedrow's question a few moments ago. (43:16-17)

AUSA Nedrow: Okay. (43:18)

*Questioning By AUSA Nadel:*

Q: I wasn't sure if I heard the answer to the question. Other than your own personal doctor that you referred to—(43:19-23)

A: Well, the team – you know, you have to have a physical. I'm sorry. Forget about the team. You have to have a physical, they take blood from you then. But I wouldn't let no one, no. That's why my personal doctor drew the blood for BALCO to begin with. (43:24-44:3)

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? (44:4-6)

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. (44:7-11)

Q: So—(44:12)

A: So sorry. (44:13)

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?(44:14-16)

A: No, no [Count Two]. (44:17)<sup>311</sup>

AUSA Nadel's line of questioning drew from Bonds a direct answer, "No, no,"(44:17)<sup>312</sup> as to who had injected or drawn from him intravenously, and the grand jury indicted Bonds for perjury for that answer. But "No, no" (44:17) answers questions as to identities of *other injectors*, wholly distinct from AUSA Nedrow's question as to whether Anderson provided a *self-injectable* substance. AUSA Nedrow already had his answer when AUSA Nadel intervened.

At the close of AUSA Nadel's questions, AUSA Nedrow rephrased his question about self-injection by Bonds:

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311. *Id.* at 43:16-44:17.

312. *Id.* at 44:17.

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? (44:18-21)

A: I'm not that talented, no.(44:22)<sup>313</sup>

AUSA Nedrow's designation of Question 44:18-21 as a "follow-up" signifies that it is AUSA Nedrow who is refocusing the questioning upon self-injection, and that if anything diverted AUSA Nedrow from the self-injection question and its presentation to the Grand Jury, it was AUSA Nadel's intervention about *others* injecting or drawing from Bonds. AUSA Nadel's interruption required the ever-alert AUSA Nedrow to reprise the self-injection question to insure that the Grand Jury understood the thrust of his own inquiry.

Only then, after refocusing the Grand Jury's attention upon self-injection, did AUSA Nedrow "move on":

Q: Okay. We have a packet that I would like to identify as Exhibit 503.

And I have distributed copies of it.

And Mr. Bonds, this is the first page. So, we're going to refer to page one of that packet. And I'd like to give you a moment, Mr. Bonds, to look at it. And I want to ask you a couple of questions about it.(44:23-45:5)<sup>314</sup>

In short, AUSA Nedrow asked two questions about self-injection (42:5-6, 43:9-12), the latter of which was answered directly (43:13); AUSA Nadel asked three questions about others who had injected or drawn from Bonds (43:19-23, 44:4-6, 44:14-16), the last of which was answered directly (44:17), and then AUSA Nedrow reprised the self-injection question (44:18-21), which was answered directly (44:22). AUSA Nedrow then moved on to a series of questions about Exhibit 503 concerning, at least initially, taking blood samples from Bonds(44:23-47:11).<sup>315</sup> AUSA Nadel then intervened again, referring to Exhibit 503 and asking about the substance "G," (47:12-48:15)<sup>316</sup> whereupon AUSA Nedrow returned to inquiring about self-injectable substances, this time specifying human growth hormone (48:16-49:25),<sup>317</sup> eliciting the same answers .(48:25-49:2 and 49:5).<sup>318</sup> In fact the transcript shows that AUSA Nadel and

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313. *Id.* at 44:18-44:22.

314. *Id.* at 44:23-45:45.

315. *See id.* at 44:23-47:11.

316. *See id.* at 47:12-48:15.

317. *See id.* at 48:16-49:25.

318. *See id.* at 48:25-49:2, 49:5.



AUSA Nedrow routinely traded questioning duties (55:8, 56:2, 62:15, 63:9, 66:13, 66:22, 72:7, 72:11, 81:4),<sup>319</sup> before the Grand Jury required a break (82:2-14).<sup>320</sup> Sometimes the attorneys changed the line of questioning, continued a line of questioning, followed up on an answer, or reprised a line of questions.

While the Grand Jury was well able to weigh the evidence and bring indictments for perjury, such as Count Two at 44:17 (“No, no.”), as well as to find something to that point unspecified in Bonds’ testimony as obstructive for Count Five, it is very difficult to see the manifestation of any obstruction in the routine sharing of questioning duties between two experienced attorneys alertly working in tandem. This matters, because the Special Verdict form only indicates that the trial jury found obstruction in Statement C, among the seven passages suggested to them in the Jury Instructions (Counts One, Two, and Three for perjury, and Statements A, B, C, and D).<sup>321</sup> As the Special Verdict form did not specify or explain why the trial jury unanimously agreed that Statement C was obstructive, any explanation of Statement C’s obstruction must come from the government’s Opposition Brief to Bonds’ Motion for Acquittal and/or a New Trial on Count Five.<sup>322</sup> Taking the Opposition Brief at its word, the prosecution struggles to identify the obstructiveness of Statement C:

1. *Statement C is false.* As it is incontestable that Bonds was a “celebrity child,” the Government’s Opposition Brief focuses on “That’s what keeps our friendship,” claiming that what keeps that friendship is not staying out of each other’s business, but is uniquely the steroid business. Judge Illston rejected that rationale for denying Bonds’ motions in that the statements were subject to any number of interpretations, none of which had been argued to the jury by the government. Crucially, the government had already conceded that Statement C was “not outright false,” and that had it been false, it would have been charged under Section 1623, along with Counts One, Two, and Three.<sup>323</sup> The government at trial then either did not view Statement C as false or could not convince Judge Illston that it was. While false testimony can certainly be a basis for obstruction under Section 1503, arguing that it is false

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319. See *id.* at 55:8, 56:2, 62:15, 63:9, 66:13, 66:22, 72:7, 72:11, 81:4.

320. See *id.* at 82:2-14.

321. Verdict, *supra* note 33, at 2.

322. See United States’ Opposition to Defendant’s Motion for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 21.

323. See Defendant’s Reply in Support of Motions for Judgment of Acquittal and/or a New Trial, *supra* note 5, at 8.

seems to be wholly *post hoc*, and the government's serial contradictory stances, as well as the effort to have it both ways at once ("not outright false"), evince a confusion about obstruction to which a standard of truth or falsity is not susceptible.

2. *Statement C led AUSA Nedrow astray, and he nearly abandoned his self-injection question until "refocused" by AUSA Nadel:* This is demonstrably untrue. This article cannot in the least endorse Bonds' Reply Brief's assertion that, "To begin, the government baldly misrepresents the record,"<sup>324</sup> but *recordatio ipsa loquitur*. Rather, the government is most evidently confused about what the obstructive impact upon the questioning might be. AUSA Nedrow was not distracted from his self-injection question, AUSA Nadel did not refocus AUSA Nedrow, and the three lines of inquiry about self-injectable substances, the identities of any injectors, and whether Bonds had injected himself were directly answered in turn. It cannot be that experienced attorneys performing just as *Bronston* directs manifest any obstruction, as no testimony is *ex ante* either 1503 or 1623. It cannot be that the experienced attorneys' routine sharing of questioning duties and alert taking of cues from one another are any more remarkable after Statement C than the turn-taking that pervades the Record and is indeed the professional norm.

3. *Statement C is non-responsive:* Rather than consider the government's argument that Statement C was false, Judge Illston relied upon the non-responsiveness of Bonds' answer and the effect of that non-responsiveness upon the government's attorneys.

Here, defendant repeatedly provided nonresponsive answers to questions about whether Anderson had ever provided him with injectables, resulting in the prosecuting attorneys asking clarifying question after clarifying question, and even once resulting in one prosecutor interrupting another who was about to move on to a new topic in order to clarify defendant's mixed responses. 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 answer is true.<sup>325</sup>

Judge Illston's observation is noteworthy in two respects. First, obstruction is manifest by the "prosecuting attorneys asking clarifying question after clarifying question," the very duty to which they are called by *Bronston*, and for which purpose the grand jury is

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324. *Id.* at 4.

325. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 14.

called. No case, no testimony, no exchange is *ex ante* 1503 or 1623, but centers, rather, upon a citizen called to the witness stand under oath to whom a consistent divide between obligation and liberty is owed. The criminality of Statement C, in Judge Illston's view, is not intrinsic in the statement itself, as in perjury, but may be contingent upon the questioner understanding that which is clear to the witness, or upon the strategic choice of the questioner to elicit repeated answers to the same question for emphasis to the jury, or upon a strategic choice to switch back and forth among lines of questions to test the consistency of the witness, all of which may be refashioned in hindsight, just as AUSA Nadel's interposition of the inquiry as to *injections by others*<sup>326</sup> was recast as AUSA Nedrow's putative rescue from "moving on" from the *self-injection inquiry*.<sup>327</sup>

This criminality in hindsight places the *actus reus* not in the testimony itself, as in perjury, but into the government's choices, both at the time of testimony and years later, from among the several reactions or potential reactions to that testimony. It is Heisenberg Culpability, where Schrödinger's defendant makes a non-responsive true statement in the witness box, and the witness is *both and neither* guiltless nor dead to rights until the government chooses to view the testimony as 1621/1623 or 1503. In other words, the attachment of criminality is not in the witness's control, but the government's. It was for this reason that the *Bronston* Court distinguished half truths, even if deceptive, on the stand from other occasions for prosecuting, say, fraud:

Petitioner's answer is not to be measured by the same standards applicable to criminally fraudulent or extortionate statements. In that context, the law goes "rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations." In contrast, "under our system of adversary questioning and cross-examination the scope of disclosure is largely in the hands of counsel and presiding officer."<sup>328</sup>

It is singular to rest felony culpability upon an Ineffective Assistance of Government Counsel theory, conceding that "our system of adversary questioning and cross-examination" had slipped from

326. See Bonds Testimony, *supra* note 14, at 43:16-44:17.

327. See United States' Opposition to Defendant's Motion for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 21, at 14.

328. *Bronston v. United States*, 409 U.S. 352, 358 n.4 (1973) (quoting A.L.I. Model Penal Code § 208.20, Comment (Tent. Draft No. 6, 1957, p. 124)).

“the hands of counsel,” palsied by the spell of a celebrity child. It is remarkable to find in the record that the purportedly ineffective counsel were in fact performing their duties precisely as *Bronston* requires, *i.e.*, persisting until their questions reveal the truth or elicit an “outright” falsehood that can be prosecuted as perjury. But it passes all understanding to find the obstruction statute used to relieve the government of the duties imposed by the perjury statutes and to eviscerate the Supreme Court’s preeminent teaching thereon. Whatever the witness’s protections under the perjury statutes, they are a nullity if the government may proceed with the Omnibus Clause instead, playing God and playing dice with uncertain principles.

Second, Judge Illston’s observation is noteworthy to the degree that the government’s confusion regarding AUSA Nadel’s purported rescue of AUSA Nedrow informs the trial court’s rationale. The trial court’s prime example of obstruction cited “one prosecutor interrupting another who was about to move on to a new topic in order to clarify defendant’s mixed responses.”<sup>329</sup> It is evident that the trial court relied upon the government’s re-characterization of the Nedrow-Nadel exchange,<sup>330</sup> rather than the record itself. For both the government and the trial court lines 43:9-13, in which AUSA Nedrow followed Statement C with the “single additional question”<sup>331</sup> about self-injectable substances, never existed:

AUSA Nedrow: 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? (43:9-12)

A [Bonds]: No. (43:13)<sup>332</sup>

For both the government and the court, AUSA Nadel’s questions (who injected?) are the same as AUSA Nedrow’s questions (self-injectable). To illustrate, the two attorneys’ questions are set forth in sequence below, with AUSA Nedrow’s topics in *italics* and AUSA Nadel’s topics underlined:

AUSA Nedrow: Did Greg ever give you *anything that required a syringe to inject yourself with?* (42:5-6)<sup>333</sup>

329. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 14.

330. See United States’ Opposition to Defendant’s Motion for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 21, at 14.

331. *Bronston*, 409 U.S. at 358.

332. Bonds Testimony, *supra* note 14, at 43:9-13.

333. *Id.* at 42:5-6 (distinct emphasis added).

AUSA Nedrow: 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?(43:9-12)<sup>334</sup>

AUSA Nadel: If I could just go back to Mr. Nedrow's question a few moments ago.(43:16-17)<sup>335</sup>

AUSA Nedrow: Okay. (43:18)<sup>336</sup>

AUSA Nadel: I wasn't sure if I heard the answer to the question. Other than your own personal doctor that you referred to—(43:19-23)<sup>337</sup>

AUSA Nadel: 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?(44:4-6)<sup>338</sup>

AUSA Nadel: —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?(44:14-16)<sup>339</sup>

AUSA Nedrow: 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? (44:18-21)<sup>340</sup>

Yet, aligning the questions of both attorneys in order makes clear (1) that AUSA Nedrow consistently asked about self-injectable substances, (2) that AUSA Nadel by contrast consistently asked the identities of any *other persons* who had injected substances into or withdrawn substances from Bonds, (3) that Nedrow's "single additional question"<sup>341</sup> at 43: 9-12 following Statement C elicited the direct answer "No" from Bonds at 43:13, (4) that Nadel's subsequent interposition of questions as to who had injected or withdrawn substances from Bonds was the only plausible distraction from Nedrow's line of questioning, (5) that it was Nedrow who refocused ("Just to follow-up") the witness and the grand jury on self-injectables following Nadel's excursion into injections and withdrawals by others and, finally, (6) that Nadel refocused no one on anything, but pursued his own new line of inquiry.

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334. *Id.* at 43:9-12 (distinct emphasis added).

335. *Id.* at 43:16-17 (distinct emphasis added).

336. *Id.* at 43:18 (distinct emphasis added).

337. *Id.* at 43:19-23 (distinct emphasis added).

338. *Id.* at 44:4-6 (distinct emphasis added).

339. *Id.* at 44:14-16 (distinct emphasis added).

340. *Id.* at 44:18-21 (distinct emphasis added).

341. *Bronston v. United States*, 409 U.S. 352, 358 (1973).

The trial court's mistaken reliance on the government's confused recharacterization of these questions and answers is important because the court considered AUSA Nadel's purported rescue of AUSA Nedrow important. Having declined to endorse the alleged falsity of Statement C, the trial court relied upon the alleged actual and potential impact of Statement C upon the prosecution and the grand jury. The trial court centered the actual impact upon the prosecutors' repeated questions, which *Bronston* makes their responsibility in any event, and upon AUSA Nadel's purported rescue of AUSA Nedrow, which never happened. Without an actual impact, there remains but amorphous speculation as to the obstructive potential as to any truthful answer, yes, no, or otherwise: "It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner . . . ." <sup>342</sup>

To make unresponsiveness the test for obstruction makes hazardous any witness's proffer of context, qualification, mitigation, or perception lest it be taken as a stalling tactic, the effect of which lasts but seconds. The very effort to give "the whole truth" would risk breaking the oath that requires exactly that.

4. *The answer is too long:* The government's core complaint is that Bonds did not either capitulate or commit perjury with an immediate Yes or No answer:

AUSA Nedrow asked if Anderson ever gave the defendant anything requiring a syringe to inject himself with. . . . This was a "yes or no" question. But instead of giving a "yes or no" answer, the defendant evaded the question by talking about how only his personal doctor touched him, and launched into a distracting explanation of how a person (*i.e.* Anderson) could only be friends with him because "we don't get into each other's personal lives," "he know . . . don't come to my house talking baseball," and "I don't talk about his business." . . . And the defendant had learned his approach to friendships because he had grown up with a famous father.<sup>343</sup>

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342. *Id.* at 359.

343. United States' Opposition to Defendant's Motion for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 21, at 14 (second alteration in original) (footnote omitted) (citations omitted).

The government's reading of Section 1503 is that any behavior or testimony short of submission is "distracting" and warrants punishment. Whatever the truth of the answer to the self-injection question, it is not the case that the truthful answer to what a questioner perceives or wishes to be a yes or no question is in fact a yes or no question, if only because the witness possesses knowledge and context that the questioner lacks, particularly before an investigative grand jury. No lawyer, no matter how skilled, can know beforehand whether an explanation of length is required to tell "the whole truth." In any event, "the requirement to answer a question directly [is] accompanied by the privilege to explain the answer"<sup>344</sup>

The government attributes criminality to the occasion for its having to do its job, *i.e.*, the probing persistent questioning to bring the truth to light. All this took was a "*single additional question*,"<sup>345</sup> which is the government's obligation. Attributing criminality to an answer longer than "yes or no" is the very type of charge that has been characterized as a crime of "obstinacy,"

a strain of process crime prosecutions aimed at securing convictions against simply defiant or insubordinate individuals—not because their action actually threatens the integrity of judicial processes or because they are otherwise difficult to convict, but solely because their acts constitute an affront to the formal dignity or authority of the state.

. . . .

. . . Whether substantively tacked onto the "core" of perversion of government function or procedurally used as a means of penalizing defendants solely for their contumacy, the obstinacy offense renders illicit more than actual frustration of government efforts—it sweeps in simple noncooperation and nonacquiescence. Obstinance offenses condemn behaviors just because they make it more difficult for police to police, or prosecutors to prosecute, or judges to judge . . . . Simple noncooperation, not active contravention, constitutes deviance.<sup>346</sup>

The Home Run King is tailor-made for just such a charge, and the boundless Omnibus Clause of Section 1503 is tailor-made to punish as non-cooperative a statement expressly beyond the writ of

344. *United States v. Minkoff*, 137 F.2d 402, 405 (2d Cir. 1943).

345. *Bronston*, 409 U.S. at 358 (emphasis added).

346. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1446, 1451 (2009).



Congress, the ruling of a unanimous Supreme Court, and the rights of free citizens even, and especially, in the witness box.

5. *The testimony is evasive.* The government's position is that Statement C is non-responsive to the question asked and stitches together truths to imply a falsehood. This is testimony squarely within *Bronston*, making further questioning incumbent upon the examiner. As conceded by the trial court, "It is true that the parties have pointed to no reported decisions reviewing such a conviction" under Section 1503.<sup>347</sup> The "narrow[ed] context, or settled legal meanings"<sup>348</sup> of "evasive" testimony under Section 1503 consists of three types of false statements, which conceal information and obstruct further inquiry: (1) false denial of memory;<sup>349</sup> (2) false denial of knowledge;<sup>350</sup> and, (3) other false accounts.<sup>351</sup> Bonds' Statement C is none of these things. "Evasive" must be used with some settled meaning if law has any chance of guiding the witness or the jurors. If judicially evolved terms such as "evasive" are to be used as criteria for culpability that must be proven beyond a reasonable doubt, the jury needs the narrowing context of the usage under Section 1503 following *Bronston*, lest the indeterminacy of the vernacular violate due process.

Thus Bonds' testimony is not criminal because Statement C was false, or non-responsive, nor too long, nor incomplete, nor evasive, nor falsely forgetful, nor especially because the government's attorneys had to do the job that the people pay them to do. If Statement C is criminal, it must be because truthful non-responsive testimony is obstructive. It is thus necessary to examine the authority for that proposition.

#### D. The *Bonds* Courts Handle the Truth

In *Bonds*, neither the District Court nor Ninth Circuit panel examined the foundations of their cited support for bringing truthful unresponsive testimony within the Omnibus Clause. The District court quoted *Cohn* for the proposition that the Omnibus Clause applies to "evasive" testimony:

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347. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 12.

348. See *United States v. Williams*, 553 U.S. 285, 306 (2008) (Scalia, J., majority opinion).

349. See *United States v. Alo*, 439 F.2d 751 (2d Cir. 1971); *United States v. Cohn*, 452 F.2d 881 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972).

350. See *United States v. Williams*, 874 F.2d 968, 977 & n.26 (5th Cir. 1989).

351. See *United States v. Brown*, 459 F.3d 509, 530-31 (5th Cir. 2006); *United States v. Thomas*, 612 F.3d 1107, 1129 (9th Cir. 2010).



[The statute] deals with the deliberate frustrations through the use of corrupt or false means of an agency's attempt to gather relevant evidence. The blatantly evasive witness achieves this effect as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.<sup>352</sup>

In fact, the quoted language is from *United States v. Alo*,<sup>353</sup> speaking in terms of Section 1505, hence the reference to an "agency's attempt to gather relevant evidence." *Cohn* cited *Alo* with reference to "evasive" testimony as false denials of memory, the "screen of feigned forgetfulness,"<sup>354</sup> rather than the broader suggestion of "misleading" true non-responsive testimony governed by *Bronston*. The District Court ignored not only *Bronston*, but also the very facts held within the *Alo/Cohn* quotation. The skimming of soundbites thus led the District Court to apply *Cohn* beyond its holding.

The same is true of its citation to *Griffin*:

Reaching a similar conclusion, the Fifth Circuit has stated that whether testimony is "described in the indictment as 'evasive' because [a person] deliberately concealed knowledge or 'false' because he blocked the flow of truthful information is immaterial." . . . In either event, it can constitute obstruction of justice, as long as the government charges and proves at trial "that the testimony had the effect of impeding justice."<sup>355</sup>

The Ninth Circuit panel similarly wrote of *Griffin*:

Several courts have noted the material similarity between evasive or misleading testimony and false testimony. In *United States v. Griffin*, the Fifth Circuit observed that there was no material difference between an evasive answer that deliberately conceals information and a false answer, because both block the flow of truthful information.<sup>356</sup>

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352. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 12-13 (quoting *Cohn*, 452 F.2d at 883-884).

353. See *Alo*, 439 F.2d at 754.

354. *Cohn*, 452 F.2d at 884 (quoting *Alo*, 439 F.2d at 754).

355. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 13 (first alteration in original) (citations omitted) (quoting *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir. 1979)).

356. *United States v. Bonds*, 730 F.3d 890, 895 (9th Cir. 2013) (citing *Griffin*, 589 F.2d at 204).

Each citation is perfectly sound except for the failure to note that the “evasive” language from *Griffin* addresses the false denial of recall in both *Cohn* and *Griffin*. In the cited quotation, *Griffin* resolved a potential tension with *Cohn*, which had posited that the false denials of memory in that case were obstruction because of the concealment of evidence rather than the falsehood of the denial. As *Griffin*’s testimony consisted of denial of knowledge as well as denial of memory, the *Griffin* court found the testimony obstructive whether viewed as concealment or falsehood.

The *Bonds* Ninth Circuit panel next cited *Perkins* without regard to its context in the *Griffin* line or *Perkins*’ feigned failure of recall:

The Eleventh Circuit in *United States v. Perkins* grouped evasive and false statements together when it stated that “a reasonable jury could have found that [the defendant’s] answers were evasive or false in an effort to obstruct the grand jury’s investigation.”<sup>357</sup>

The *Perkins* court, in fact, grouped *Perkins*’ ordinary falsehoods with “evasive” false denial of recall: “No, I don’t think I did. I might have, but I don’t recall right now, having done it.”<sup>358</sup>

The *Bonds* courts’ principal supports for including “evasive” truthful non-responsive testimony within Section 1503 thus fail to take into account the specific meaning of “evasive” in *Alo*, *Cohn*, *Griffin*, and *Perkins*. Nor do they take into account *Bronston*, the case that does apply to misleading truthful non-responsive testimony.

The *Bonds* courts’ other authority is yet less applicable. Both cite *United States v. Remini*.<sup>359</sup> The District Court wrote:

Defendant argues that the jury’s guilty verdict cannot stand because section 1503 does not proscribe obstructing justice by means of truthful but evasive answers. *It is true that the parties have pointed to no reported decisions reviewing such a conviction.* [Emphasis added.] However, at least one federal district court has concluded “that literally true but evasive and misleading testimony” would support a conviction under section 1503. *See United States v. Remini*, 967 F.2d 754, 755 (2d Cir. 1992) (describing a trial court rul-

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357. *Id.* at 895 (alteration in original) (quoting *United States v. Perkins*, 748 F.2d 1519, 1527-28 (11th Cir. 1984)).

358. *Perkins*, 748 F.2d at 1522 n.7.

359. 967 F.2d 754 (2d Cir. 1992).

ing in *United States v. Gambino (Thomas)*, 89-CR-431 (E.D.N.Y.) (Jack B. Weinstein, J.).<sup>360</sup>

Likewise, the Ninth Circuit panel cited *Remini*: The Second Circuit quoted with approval the district court in *United States v. Gambino (Thomas)*, No. 89-CR-431 (E.D.N.Y.), in which Judge Jack Weinstein said that “literally true but evasive and misleading testimony would support prosecution of [the defendant] for obstruction of justice.”<sup>361</sup>

In fact, the *Remini* case was an obstruction case based upon the defendant’s refusal to testify at all in the *Gambino* case, even after *Remini* had been granted immunity.<sup>362</sup> As indicated, Judge Weinstein’s position during the *Gambino* trial was not before the *Remini* court, as *Remini* himself had said absolutely nothing in the *Gambino* trial. The Second Circuit’s entire treatment of the issue is in the first paragraph giving the context of the *Gambino* trial.

*Remini*’s indictment and conviction resulted from his refusal to testify in November 1989 at the trial of *United States v. Thomas Gambino*, 89 Cr. 431, in the Eastern District of New York, Jack B. Weinstein, J. The indictment in that case charged *Gambino* with giving false, evasive and misleading testimony to a grand jury, in violation of 18 U.S.C. § 1503. During the trial, Judge Weinstein ruled that literally true but evasive and misleading testimony would support prosecution of *Gambino* for obstruction of justice.<sup>363</sup>

*Remini*’s reaction is actually the textbook example of the effect on witnesses of which *Bronston* had warned:

When the government called *Remini* to testify, *Remini* moved to quash the trial subpoena, claiming that the government intended to ask him questions derived from illegal electronic surveillance. He also claimed that his immunity order was inadequate under the Fifth Amendment because the government had maintained the position in the *Gambino* trial that literally true but misleading answers given under an immunity order would be subject

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360. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 11-12 (emphasis added) (footnote omitted) (citing *Remini*, 967 F.2d at 755)

361. *Bonds*, 730 F.3d at 895-96 (citing *Remini*, 967 F.2d at 755).

362. *See Remini*, 967 F.2d at 755.

363. *Id.*

to prosecution. Judge Weinstein denied Remini's motion to quash.<sup>364</sup>

As *Bronston* foretold:

To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of "intent to mislead" or "perjury by implication." The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: "that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying."<sup>365</sup>

Better than trying Remini for refusal to testify would have been testimony from Remini without Judge Weinstein's ruling. This bears upon the value of the *Remini* paragraph as authority in *Bonds*.

First, there was no testimony by Remini so we have no idea just what potential testimony was pre-characterized as "literally true but evasive and misleading." There is no hint as to whether the allusion is to false denial of memory, or to responsive or non-responsive answers.

Second, there is no indication as to whether or how Judge Weinstein addressed *Bronston*. The *Gambino* case could not have been either 1621 or 1503 before testimony even occurred.

Third, there is no allusion in *Remini* as to what other testimony in *Gambino* might have been related to Judge Weinstein's ruling.

Fourth, nothing in the Second Circuit's description of Judge Weinstein's ruling in the context of the *Gambino* case can be described as "with approval." There are no words of approval. There is a serial recital of events at trial and nothing more.

The *Bonds* District Court referred to two other cases for support:

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364. *Id.*

365. *Bronston v. United States*, 409 U.S. 352, 359 (1973) (quoting Study of Perjury, reprinted in Report of New York Law Revision Commission, Legis.Doc.no.60, p. 249 (1935)).

Additionally, with regard to 18 U.S.C. section 1505, which uses nearly identical language to proscribe obstruction of administrative proceedings and legislative inquiries and investigation, the D.C. Circuit has explained that “literal truth may not be a complete defense to obstruction,” because “[e]ven a literally true statement may be misleading.” See *United States v. Safavian*, 528 F.3d 957, 968 (D.C. Cir. 2008); see also *United States v. Browning*, 630 F.2d 694, 699 (10th Cir. 1980) (“Literal truth is not the test here”).<sup>366</sup>

Neither *Safavian* nor *Browning* had to do with sworn testimony under oath. *Safavian*, a federal agency official, had written a letter requesting ethics advice, had been interviewed by a federal agent about his ethical conduct, and had written a letter to the Senate subcommittee investigating the matter.<sup>367</sup> Neither the interview nor the letters are sworn testimony under oath in court subject to the cross-examination process to which *Bronston* applies.

*Safavian* was convicted of five counts of false statements under 18 U.S.C. § 1001 and obstruction under Section 1505. The D.C. Circuit *reversed* all convictions in pertinent part because the trial court excluded an expert witness who could testify as to the specialized technical meanings of *Safavian*’s words.<sup>368</sup> The D.C. Circuit’s observation on “literal truth” compared *Safavian*’s charges and defenses under Section 1505 to those under Section 1001.<sup>369</sup> The charges under Section 1001 would have been subject to a literal truth defense.<sup>370</sup> The basis of comparison was the application of the definitions of 18 U.S.C. § 1515(b) by its express terms to Section 1505, as distinct from Section 1001. Section 1515 provides: “(b) 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, con-

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366. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 12 (alteration in original) (emphasis added) (in-text citations maintained).

367. See *Safavian*, 528 F.3d at 960-62.

368. See *id.* at 968.

369. See *id.* at 967-68.

370. See *id.* (“With respect to Counts 2 and 5, which charged violations of § 1001(a) (1), literal truth would have been a complete defense. . . . If *Safavian* intended having business or working with GSA to have the meaning used by government contract professionals, then he did not knowingly and willfully make a false statement to the GSA ethics officer (Count 2) or the Senate Committee (Count 5).”). *Id.* (footnote omitted) (citations omitted).

cealing, altering, or destroying a document or other information.”<sup>371</sup>

The D.C. Circuit noted that Congress had defined “corruptly” for Section 1505 to include making a false or “misleading” statement. This was not true of Section 1001, as Section 1515 applies by its explicit terms exclusively to Section 1505.

One is guilty of obstruction if he “corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede” an investigation. 18 U.S.C. § 1505. Section 1515 defines “corruptly” as “acting with an improper purpose . . . including making a false or misleading statement, or withholding, [or] concealing” information. Even a literally true statement may be misleading and so, unlike § 1001(a)(1), literal truth may not be a complete defense to obstruction.<sup>372</sup>

Had Congress wished to apply the same interpretation to testimonial obstruction under Section 1503, it could or would have when it enacted Section 1515(b). *Safavian* does not therefore offer support for the *Bonds* District Court.

Nor does *United States v. Browning*.<sup>373</sup> John V. Browning was president of Browning Arms Company, which imported certain arms from France for sale in the United States. As a price in excess of \$25.00 triggered a substantial import duty, Browning kept the price just below \$25.00 and compensated the French firm (Fabrique Nationale or FN) for the differential with the real costs with side payments. When customs officials began to investigate the practice, it required that the French firm disclose payments over the invoice price. Browning was convicted under 18 U.S.C. § 1505 of obstructing the due administration of the customs laws by suggesting to the French that the cost differential be attributed to “general overhead” rather than side payments, which would amount to fraud.<sup>374</sup>

Browning sought to assert *Bronston* on appeal. The Tenth Circuit correctly distinguished a perjury prosecution for false testimony in court from impeding a customs investigation by urging another to misrepresent the truth:

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371. 18 U.S.C. § 1505(b) (2012).

372. *United States v. Safavian*, 528 F.3d 957, 967-68 (D.C. Cir. 2008) (citing *United States v. Browning*, 630 F.2d 694, 699 (10th Cir. 1980)).

373. 630 F.2d 694 (10th Cir. 1980).

374. *See id.* at 696-98.

The ultimate question in the case at bar is not whether the defendant told the truth but whether the defendant obstructed or interfered with the process of truthfinding in an investigation in the process of enforcing the law. In other words, was the defendant, Mr. Browning, seeking to counsel FN to answer the questions in a manner which would interfere with the process of truthfinding? Literal truth is not the test here, and, in any event, Browning did not counsel FN to tell the literal truth.<sup>375</sup>

Literal truth was indeed not the test in *Browning* because it had to do with out of court business communications rather than anything said in court. Were it the test, Browning himself did not counsel literal truth, but rather a mischaracterization of payments in FN's response to a U.S. Customs investigator.<sup>376</sup>

"Literal truth is not the test here"<sup>377</sup> was perfectly applicable under Section 1505 to out of court statements to investigators. "Literal truth" is, however, the test for non-responsive answers under oath in court whether the charge can be brought under Section 1621, 1623, or 1503. Thus neither *Safavian* nor its reference to *Browning* supports the *Bonds* courts upon examination of those cases.

#### IX. ALTERNATIVE BASES FOR BONDS' CULPABILITY UNDER SECTION 1503

As there is little to no precedent plausibly supporting the inclusion of truthful non-responsive testimony by a witness within Section 1503, such an expansion would have to rest upon less specific support. The Omnibus Clause's broad language condemns whoever corruptly shall "influence, obstruct, or impede the due administration of justice" or "endeavor" to do so.<sup>378</sup> The government and the *Bonds* courts have justified his conviction on two other bases. First, the "all-embracing"<sup>379</sup> scope of the Omnibus Clause justifies developing new grounds on which to prosecute truthful non-responsive testimony as obstruction where there is no such development to date. Second, Statement C as of its uttering constituted an "endeavor" to obstruct justice without regard to any such manifesta-

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375. *Id.* at 699.

376. *See id.* at 697-700.

377. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 1214 (quoting *Browning*, 630 F.2d at 699).

378. *See* 18 U.S.C. § 1503.

379. *United States v. Solow*, 138 F. Supp. 812, 814 (S.D.N.Y. 1956).

tion beyond the additional questions yet to be asked by the attorneys.

### A. “All-Embracing” Scope of the Omnibus Clause

As courts have encountered novel schemes to obstruct justice through the development of the law in the Twentieth Century, the broad language of the Omnibus Clause has been used to punish those obstructions unspecified by the Congress in 1831. This development may be traced at least as far as *Bosselman v. United States*, where the defendant was charged with corruptly persuading his employees to alter business records under subpoena to a grand jury investigating the sale of obscene imported figures.<sup>380</sup> Bosselman argued at his obstruction trial that he did not persuade the employees “corruptly,” *i.e.*, by means of a bribe. The Second Circuit defined “corruptly” more broadly: “[A]ny endeavor to impede and obstruct the due administration of justice in the inquiries specified is corrupt.”<sup>381</sup>

The same language was echoed in *Samples v. United States*, the case most often cited for the expansiveness of the Omnibus Clause, though it was not an Omnibus Clause case.<sup>382</sup> Samples was charged with witness tampering under the first part of the obstruction statute, but the Fifth Circuit spoke to the general scope of the obstruction statute: “The statute is broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice.”<sup>383</sup> The *Samples* court cited this language from *United States v. Russell*,<sup>384</sup> even though Justice McKenna was distinguishing the concept of “endeavor” from the preparatory steps toward “attempt” in a jury tampering case rather than the Omnibus Clause.<sup>385</sup> The *Samples* court described the obstruction statute as “designed to protect witnesses in Federal courts and also to prevent a miscarriage of Justice by corrupt methods.”<sup>386</sup> *United States v. Catrino*,<sup>387</sup> another witness tampering case, gave a rationale for the Omnibus Clause: “The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt

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380. See generally *Bosselman v. United States*, 239 F. 82 (2d Cir. 1917).

381. *Id.* at 86.

382. See *Samples v. United States*, 121 F.2d 263 (5th Cir. 1941).

383. *Id.* at 266.

384. See *id.* (citing *United States v. Russell*, 255 U.S. 138 (1921)).

385. See *Russell*, 255 U.S. at 143, cited with approval in *Osborn v. United States*, 385 U.S. 323, 333 (1967).

386. *Samples*, 121 F.2d at 265.

387. 176 F.2d 887 (9th Cir. 1949).



methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined."<sup>388</sup>

With *Russell*, *Samples*, and *Catrino* as the foundation, each successive case brought new elaboration to the scope and purpose of Section 1503 in general and to the Omnibus Clause in particular: "This latter [omnibus] provision . . . is all-embracing and designed to meet any corrupt conduct in an endeavor to obstruct or interfere with the due administration of justice."<sup>389</sup> "The statute condemns 'any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent.'<sup>390</sup> "This latter language of Section 1503 is a broad 'catch-all' phrase in the statute."<sup>391</sup> "It embraces the widest variety of conduct that impedes the judicial process."<sup>392</sup>

Thus was the pervasive view of the scope of Section 1503 at the time that *Bronston* was decided. After *Bronston*, the Courts of Appeal rejected the limits of *ejusdem generis* placed upon Section 1503 by *Haili* and *Essex*.<sup>393</sup> Ultimately, the Ninth Circuit harmonized the *ejusdem generis* principle from its decision in *Haili* with the expansive holdings of the other circuits in *United States v. Rasheed*: "The act of destroying or concealing subpoenaed documents is 'similar in nature,' . . . to the enumerated acts. . . . That one act suppresses

388. *Id.* at 887.

389. *United States v. Solow*, 138 F. Supp. 812, 814 (S.D.N.Y. 1956) (referring to destruction and removal of documents).

390. *United States v. Siegel*, 152 F. Supp. 370, 373 (S.D.N.Y. 1957) (quoting *Russell*, 255 U.S. at 143; *Broadbent v. United States*, 149 F.2d 580, 581 (10th Cir. 1945)) (referring to destruction and false substitution of documents).

391. *Falk v. United States*, 370 F.2d 472, 476 (9th Cir. 1966) (suborning perjury).

392. *United States v. Rosner*, 352 F. Supp. 915, 919 (S.D.N.Y. 1972) (paying to obtain copies of documents from U.S. Attorney's office).

393. *See United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir. 1978) (noting sale of grand jury transcripts). "We cannot agree with this reading of the statute because it renders the omnibus clause superfluous . . ." *Id.*; *see also United States v. Faudman*, 640 F.2d 20, 23 (6th Cir. 1981) (describing defendant's crime—altering corporate documents). "Unless something more than the precise acts listed in the earlier language was intended for inclusion, the 'omnibus' language of § 1503 would be surplusage." *Faudman*, 640 F.2d at 23. *See also United States v. Partin*, 552 F.2d 621, 631 (5th Cir. 1977) (suborning perjury). "The means allegedly chosen . . . may well have violated the more specific first clause of § 1503. But we do not think that would prevent the endeavor from violating the broader 'due administration' clause as well[.]" *Partin*, 552 F.2d at 631 (footnote omitted) (citations omitted). *See also United States v. Cintolo*, 818 F.2d 980, 992 (1st Cir. 1987) (explaining lawyer abused client relation to discover information for benefit of another criminal and to coerce client not to testify against the criminal). "[M]eans, though lawful in themselves, can cross the line of illegality if . . . employed with a corrupt motive . . ." *Cintolo*, 818 F.2d at 992.

testimonial evidence while the other act suppresses real evidence is of no importance.”<sup>394</sup>

Each iteration of an Omnibus Clause case called forth another formulation of its power so that the reach of the statute seems nigh limitless. The Supreme Court has acknowledged the breadth of Section 1503 in *United States v. Aguilar*, where a federal district judge was accused of lying to FBI agents investigating corruption in the court: “[T]he ‘Omnibus Clause’ serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute.”<sup>395</sup>

Yet while the Omnibus Clause is “far more general in scope,” it is not infinite in scope, as the *Aguilar* opinion demonstrated. “Recent decisions of Courts of Appeals have likewise tended to place metes and bounds on the very broad language of the catchall provision.”<sup>396</sup> In other words, the “catchall” provision does not literally catch all. For instance,

The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court’s or grand jury’s authority. . . . Some courts have phrased this showing as a “nexus” requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings.<sup>397</sup>

Though the Circuit Courts of Appeal had a seventy year tradition of extending the Omnibus Clause to “embrace” (*Solow*) any and all endeavors within “the imagination of the criminally inclined” (*Catrina*), and though it beggars the imagination to suppose that Judge Aguilar did not endeavor to skew the reports of the agents who had the duty to inform the very authorities with the power to convene a grand jury, the Supreme Court drew limits on the Omnibus Clause from its own precedent.<sup>398</sup> No matter how likely judicial proceedings might be, there had to be notice of the

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394. *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (citing *Haili v. United States*, 260 F.2d 744, 746 (9th Cir. 1958)).

395. *United States v. Aguilar*, 515 U.S. 593, 598 (1995).

396. *Id.* at 599.

397. *Id.* (citations omitted) (citing *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982)).

398. *See Pettibone v. United States*, 148 U.S. 197, 206-07 (1893).

pendency of present proceedings before the defendant could form the requisite intent to obstruct justice.<sup>399</sup>

Nor is Section 1503 alone in having all-embracing language limited in scope by the Supreme Court. *Bronston* itself is a limitation, at the very least, of both Sections 1621 and 1623 as to *implied* falsehoods. The Supreme Court has also limited broad language in Section 1623.<sup>400</sup> The text of Section 1623(c) is similarly expansive as Section 1503 in that it prohibits irreconcilably contradictory declarations under oath “in *any* proceedings before or ancillary to *any* court or grand jury of the United States.”<sup>401</sup> The Supreme Court rejected the government’s contention that “any proceeding” included an oral statement made under oath administered by a notary public without counsel present in another inmate’s attorney’s office. The statement purportedly recanted prior grand jury testimony implicating the fellow inmate. The government argued for an expansive reading of “any proceeding before or ancillary to” a United States court based upon the Congress’s purpose in enacting Section 1623 “to facilitate perjury prosecutions and thereby enhance the reliability of testimony before federal courts and grand juries.”<sup>402</sup>

Even in view of the Congress’s express purpose to facilitate perjury prosecutions, a unanimous Court rejected this all-embracing scope of the statute by comparison to 18 U.S.C. § 6002 pertaining to grants of immunity to witnesses in proceedings ancillary to a court. As Section 6002 applied to no proceeding less formal than a pre-trial deposition, consistency with the related statute required commensurate reading of “any proceeding,” even where the Congressional purpose in enacting both provisions was to facilitate the prosecution of false statements under oath. Equally important, the narrow reading was required so that:

no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. . . . Thus to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not “plainly and unmistakably” proscribed.<sup>403</sup>

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399. See *Aguilar*, 515 U.S. at 599-601.

400. See generally *Dunn v. United States*, 442 U.S. 100 (1979).

401. See 18 U.S.C. § 1623(a) (2012) (emphasis added).

402. See *Dunn*, 442 U.S. at 107 (citing S. Rep. No. 91-617, at 58-59 (1969)).

403. *Id.* at 112-13 (citations omitted).

The Ninth Circuit itself, in a post-*Rasheed* case which anticipated *Aguilar*, limited the scope of the Omnibus Clause of Section 1503 to yield to the coverage of 18 U.S.C. § 2232 as to interfering with executions of search warrants outside the ambit of a pending judicial proceeding: “It is . . . important to read [Section] 1503 in the context of other statutes relating to obstruction of justice.”<sup>404</sup> Yet more recently, the Ninth Circuit read into the Omnibus Clause a requirement of materiality for testimonial obstruction on the basis of *Rasheed*.<sup>405</sup>

The lesson of *Aguilar*, *Dunn*, *Brown*, and *Thomas* is that, despite the consistent background of expansive interpretations of the Omnibus Clause, that scope is not illimitable and has in fact been limited by the Supreme Court. There is no reason to suppose that *Aguilar*'s limitations on the Omnibus Clause Section 1503 are alone, especially where Congress has spoken specifically as to sworn testimony and the Supreme Court has so expressly interpreted Congressional intent as to truthful non-responsive testimony in court. The tradition of expansive interpretations of the Omnibus Clause is not absolute. In line with the Ninth Circuit in *Brown*, that tradition must be applied in light of other statutes applying to testimonial obstruction. *Bronston* is such a limitation on non-responsive truthful answers, regardless of their possible calculated intent. Perhaps the most important limitation on the Omnibus Clause, fundamental to all others, is articulated in *Aguilar*, requiring that “a fair warning be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”<sup>406</sup> Applying *Bronston* would be the clearest manifestation of a certain line and a fair warning.

## B. Endeavor

The Omnibus Clause proscribes any “endeavor” to “influence, obstruct, or impede the due administration of justice.”<sup>407</sup> The Supreme Court defined the term in *United States v. Russell*, where the defendant argued that his conversations with a prospective juror's wife did not sufficiently approach jury tampering to constitute “attempt.”<sup>408</sup> Justice McKenna distinguished the statute's wording of

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404. *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982)).

405. *See United States v. Thomas*, 612 F.3d 1107, 1129 (9th Cir. 2010). . .

406. *See Aguilar*, 515 U.S. at 600 (internal quotation marks omitted) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

407. 18 U.S.C. § 1503(a) (2012).

408. *See United States v. Russell*, 255 U.S. 138, 140-43 (1921).

“endeavor” from the nearness to success attendant upon the common law of “attempt.” Rather “endeavor” means “any effort or essay to do or accomplish the evil purpose . . . .”<sup>409</sup>

That effort or essay, however, must be made manifest lest criminality attach merely to a wholly inchoate state of mind. That manifestation may be comparable to the “overt act” required under common law conspiracy, which may be *de minimis* but needs to be observable to signify the underlying agreement. Such an overt act detectably manifests the endeavor where, as in *Russell*, the defendant approaches the juror’s wife rather than the juror, or where a bribe is offered but not accepted, or where documents are altered, or where a demonstrable falsehood is sworn to on the stand, regardless of whether justice is actually delayed or denied.

The difficulty in applying the “endeavor” element to a non-responsive true statement is that such a statement does not in and of itself manifest an essay to accomplish the evil purpose.<sup>410</sup> A non-responsive true statement may indeed be too clever by half, stitching a false impression from truthful statements, or it may be purposed to provide context or excuse without which a naked yes or no leaves an impression equally false. It may be the witness’s effort to parse aloud a poorly framed question, or to discern if there is a variance in the time frame vis-a-vis a prior question.<sup>411</sup> While the falsity of perjurious testimony makes manifest an endeavor to obstruct justice, the very lack of falsity invites only speculation as to whether a non-responsive true answer is a contextual explanation or a calculated endeavor.

Although inferences may be drawn from an evasive reply, the witness generally does not intend to communicate those inferences. As a result, the inferences that might be drawn are not “statements” by the witness. Furthermore, drawing inferences from evasion or silence is an imperfect art at best. Imposing criminal sanctions on the basis of what is often a speculative venture seems to provide court and jury with virtually unbridled discretion that could well be abused. It is in the area of evasive responses that the Court’s arguments hit their target and justify the rule that

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409. *Id.* at 143.

410. *Cf.* *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005) (persuading another to withhold testimony or documents from court is not inherently malign, *e.g.*, a mother urging a son to invoke Fifth Amendment or one spouse urging the other not to disclose privileged marital confidences).

411. *See* *United States v. Landau*, 737 F. Supp. 778, 781-84 (S.D.N.Y. 1990).

the law of perjury is too blunt an instrument to deal with the problem of literally true but evasive answers.<sup>412</sup>

If perjury is too blunt an instrument, then the ever-malleable Omnibus Clause is yet more liable to an abuse of unbridled discretion. It is for this reason that *Bronston* forbids such speculation lest the rush to punish an assumed endeavor obscure the truth to be seined from pressing forward with questioning. It is for this reason that *Bronston* spoke comprehensively to the statutory instruments of policing testimony well established or incipient at the time.

After trial, the government argued that were Statement C true, it would still constitute an endeavor, quoting *Griffin* as to “delaying the punishment of the guilty.”<sup>413</sup> The trial court elaborated that Statement C was an endeavor because Bonds “repeatedly provided nonresponsive answers to questions about whether Anderson had ever provided him with injectables, resulting in the prosecuting attorneys asking clarifying question after clarifying question.”<sup>414</sup> Likewise the Ninth Circuit panel found an endeavor to have occurred once Statement C was non-responsive to the question: “This evidence at trial showed that Bonds’ statement to the grand jury was misleading. It is irrelevant that Bonds eventually provided a direct response to the question about self-injectable substances. Section 1503 punishes any ‘endeavor’ to obstruct. Obstruction occurred when Bonds made Statement C.”<sup>415</sup>

For the *Bonds* courts, Statement C would constitute a culpable “endeavor” once its non-responsiveness obligates the attorneys to press on with questions to get an answer “delayed” by moments. Yet, *Bronston* precludes this view of “endeavor.” First, while it is true that Section 1503 does not refer to truth or falsity as elements, the whole purpose of questioning the witness is to elicit the truth, so that an endeavor to obstruct must necessarily be manifest by the relation of the answer to the truth. False or perjurious answers thus can be readily identified as predicates for obstruction, provided that the *Aguilar* nexus is proven as well. It is in this context that the government’s quotation from *Griffin*<sup>416</sup> must be understood, for the

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412. Peter Meijes Tiersma., *The Language of Perjury: “Literal Truth,” Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 386-87 (1990).

413. United States’ Opposition to Defendant’s Motion for Judgment of Acquittal and/or a New Trial on Count Five, *supra* note 21, at 1714 (emphasis omitted) (quoting *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir. 1979)).

414. Order Denying Motion to Acquit and for a New Trial, *supra* note 6, at 14.

415. *United States v. Bonds*, 730 F.3d 890, 896 (9th Cir. 2013), *reh’g en banc granted*, 757 F.3d 994 (9th Cir. 2014).

416. *See Griffin*, 589 F.2d at 204.

Fifth Circuit referred expressly in that paragraph to false denials of knowledge or memory: “No; I don’t know; Not that I can recall.”<sup>417</sup> These false denials delayed the due administration of justice as if the witness had refused to testify at all, as the denial foreclosed the opportunity for further questioning. This is distinct from *Bronston*’s recognition of the inherent guesswork in gauging the import of the truthful non-responsive answer:

Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question—unless there is to be speculation as to what the unresponsive answer ‘implies.’<sup>418</sup>

The non-responsive truthful answer cannot be tested vis-a-vis the truth sought by the question. It is not intrinsically blameworthy conduct any more than urging the witness to invoke the Fifth or the marital privilege. It is one thing to proscribe an endeavor the evil intent of which is “foiled”<sup>419</sup> shy of fruition; it is another to criminalize an unresponsive truthful answer, the inchoate intent of which can only be speculative, because the questioner is obliged to undertake the very duty of questioning imposed by *Bronston*. The Supreme Court weighed the risk that such an answer may be misleading and chose to require the attorney to do more, lest the jury be called upon to speculate. *Bronston* has thus defined the “due administration of justice” and thereby ruled the truthful nonresponsive answer outside the scope of culpable “endeavor” under Section 1503.

In short, the very manifestations of a culpable endeavor presented by the government and the *Bonds* courts are the very obligations placed on all attorneys by *Bronston*. To regard Statement C as a culpable endeavor is to overturn *Bronston* and place a hair trigger on every wayward sentence a witness utters. To paraphrase *Bronston*, one can “perceive no reason why Congress would intend the drastic sanction of a [Section 1503] prosecution to cure a testimonial mishap that could readily have been reached with *a single*

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417. *Id.*

418. *Bronston v. United States*, 409 U.S. 352, 355 n.3 (1973).

419. *See United States v. Aguilar*, 515 U.S. 593, 601 (1995).



*additional question* by counsel alert—as every examiner ought to be—to the incongruity of petitioner’s unresponsive answer.”<sup>420</sup>

Rolling back *Bronston* for the sake of a speculative “endeavor” is a drastic means of reconciling the Omnibus Clause with Sections 1621 and 1623. Applying *Bronston* to all perjury and obstruction statutes applying to the sworn testimony of witnesses preserves the will of Congress and follows the unanimous teaching of the Supreme Court.

## X. SECTION 1503 IN THE CONTEXT OF *BRONSTON*

Applying *Bronston* to Section 1503 does not exempt all literally true statements from culpability for obstruction any more than it exempts all literally true statements from culpability for perjury. Beyond the bounds set forth in *Bronston* for truthful unresponsive sworn testimony by a witness, culpability for obstruction could well attach to certain parties on the basis of true statements under certain circumstances.

### A. Applying Section 1503 to Witnesses

*Bronston* applies by its reasoning and terms solely to truthful non-responsive answers by witnesses in court. Many defendants have sought to apply, and some courts have extended, the rationale of *Bronston* to other types of answers, often literally true responsive answers to ambiguous questions.<sup>421</sup> As the Supreme Court has not spoken to such an application, this article imputes no application of *Bronston* to Section 1503 any broader than that defined by the Supreme Court in 1973: non-responsive and truthful testimony by a sworn witness in court.

If *Bronston* is applied to truthful non-responsive answers under Section 1503, two questions arise. First, can a non-responsive false answer be subject to the Omnibus Clause? Second, does a truthful responsive answer immunize the witness from an obstruction charge regardless of how restricted, incomplete, or misleading that truth? The following cases are instructive.

First, a false non-responsive answer does carry the requisite manifestation of corrupt motive in its very falsity. For purposes of perjury, the falsehood need not be responsive so long as it is material. Volunteered falsehoods injected into the questioning are thus either false statements under Section 1623, or statements the wit-

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420. See *Bronston*, 409 U.S. at 358 (emphasis added).

421. See, e.g., *United States v. Tonelli*, 577 F.2d 194 (3d Cir. 1978).



ness does not believe to be true under Section 1621. There is no *Bronston* shelter for volunteered falsehoods under those statutes.

The crime [of perjury] is based on the explicit statement rather than on an unstated implication. Thus, the falsity is not conjectural and the proof of falsity is not premised on inferences attempted to be extracted from the fact of unresponsiveness. Furthermore, calling the witness' attention to the unanswered question to cure the unresponsiveness will in no way cure the prior falsehoods which the witness has put on the record in his unresponsive answer. Regardless of how or whether the witness responds to the question which he has yet to answer, the record remains tainted by the false testimony which he has already volunteered during his initial nonresponse.<sup>422</sup>

Provided the *Aguilar* nexus is met, the non-responsive or volunteered falsehood can be subject to Section 1503 as well, as its corruption is not speculative but intrinsic to falsehood.

Second, while the non-responsive falsehood is subject to Section 1503, the responsive but incomplete truth may or may not be within the Omnibus Clause, depending upon the circumstance.

As a baseline, one first must consider what is expected of the witness under interrogation. The Supreme Court of California invoked *Bronston* in considering a truthful, responsive, but incomplete answer. While *Bronston* itself applied to truthful *non-responsive* answers, the California court taught in a habeas corpus case that the witness is to answer the question as asked and is not to volunteer testimony that conceivably paints a more complete picture for the examiner.<sup>423</sup> No culpability should thus attach where the witness answers what is asked without elaboration.

The petitioner Rosoto, having been convicted and sentenced to death for multiple felonies, brought a habeas corpus petition, which was denied, and then a second, alleging perjury at his trial and also during the hearing on the first petition. Rosoto alleged that Frank Oxandaboure, the chief investigator for the district attorney's office, had lied at the first hearing when he denied any discussions or assurances of immunity and freedom from arrest to a key prosecution trial witness, Rosoto's brother Michael. Michael, in turn, was accused of having lied at the trial.<sup>424</sup>

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422. United States v. Corr, 543 F.2d 1042, 1049 (2d Cir. 1976).

423. See *In re Rosoto*, 519 P.2d 1065 (Cal. 1974) (*en banc*).

424. See *id.* at 1066-67.

Oxandaboure's testimony in the first hearing did not reveal the full extent of understandings he had with authorities with regard to the witness Michael Rosoto. Nonetheless, even when a witness is giving a responsive truthful answer, the California Supreme Court admonished the witness against completing information beyond the scope of the question:

The testimony of a witness is ordinarily elicited either by general questions seeking a narration of events or a series of specific questions calling for specific answers as to each fact. . . . When counsel uses the latter method the witness should respond to the question. He should not evade or volunteer matters not specifically asked for; the nonresponsive answer may be stricken on motion of the questioner who is entitled to elicit testimony in his own way and to confine the scope of the examination as he sees fit.<sup>425</sup>

This is consistent with the standard advice that counsel give witnesses. The District of Columbia Circuit so observed in the context of Section 1001:

Attorneys commonly advise their clients to answer questions truthfully but not to volunteer information. Are we to suppose that once the client starts answering a government agent's questions, in a deposition or during an investigation, the client must disregard his attorney's advice or risk prosecution under § 1001(a)(1)? The government essentially asks us to hold that once an individual starts talking, he cannot stop. We do not think § 1001 demands that individuals choose between saying everything and saying nothing. No case stands for that proposition.<sup>426</sup>

The California Supreme Court went on to give the rationale in *Rosoto*:

The reason for this rule is dramatically illustrated by the defense counsel's testimony that he chose not to present evidence at trial of Oxandaboure's guarantee that Michael would not be prosecuted because the guarantee had been conditioned on Michael telling the truth, and the jury's knowledge of the condition might be harmful. Counsel's

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425. *Id.* at 1071 (citations omitted); *accord* State v. Olson, 594 P.2d 1337, 1340 (Wash. 1979) (*en banc*).

426. United States v. Safavian, 528 F.3d 957, 965 (D.C. Cir. 2008).

trial strategy would have been defeated if Oxandaboure or Michael, although not asked about a guarantee of immunity, had nevertheless been permitted to volunteer it.<sup>427</sup>

The California Supreme Court, following *Bronston*, placed the onus on the questioner to dispel any misimpression created by a truthful responsive answer.

It is thus apparent that when, as here, a witness' answers are literally true he may not be faulted for failing to volunteer more explicit information. Although such testimony may cause a misleading impression due to the failure of counsel to ask more specific questions, the witness' failure to volunteer testimony to avoid the misleading impression does not constitute perjury because the crucial element of falsity is not present in his testimony.<sup>428</sup>

This principle is equally applicable to obstruction as it is to perjury. If the witness has no requirement, then he has no requirement, absent a question to elicit the specific information that he is then obliged to give:

Oxandaboure was not required to volunteer testimony as to a guarantee other than the one of which he was asked, and although his answers to the questions asked may have left a misleading impression that not even a conditional guarantee was made, he was never asked whether a conditional guarantee of any kind was made.<sup>429</sup>

A witness giving responsive answers need not go beyond the scope of the question, even where the witness might speculate as to what more the questioner intends. The witness should not have to speculate what the questioner intends at all. A witness giving responsive truthful incomplete information within the question's bounds should bear no culpability where it is the question, rather than the answer, which conceals.

On the other hand, a responsive, truthful, incomplete answer may be perjurious where either the question elicits or the answer purports to give complete information. Provided that the *Aguilar* nexus is proven as well, such an answer would be subject to the Omnibus Clause.

427. *In re Rosoto*, 519 P.2d at 1071.

428. *Id.*; *accord* Chein v. Shumsky, 373 F.3d 978, 980, 985 (9th Cir. 2004).

429. *In re Rosoto*, 510 P.2d at 1071-72.

For example, a Kentucky legislator was convicted under Section 1001 for false statements to the FBI.<sup>430</sup> The agent asked about cash payments or any other gratuity that the legislator received on a trip out of state:

Q: So in answer to that question, the *only thing* that comes to mind is a is a type of gratuity which would have been a day at the races or something to that effect.

A: No no sir uh . . . I went out on a boat ride that Friday. Uh . . . and uh . . . I understood Mr. Richardson had . . . owned the boat or or had a friend that had the boat. Uh . . . but I didn't pay any money, buy any gasoline for the boat.

Q: Okay.

A: I don't uh . . . uh . . . there they had uh beverages and food on on board you know, I and I accepted that.<sup>431</sup>

LeMaster's list purported in its detail to be complete in its response to the question about the "only thing" received being "a day at the races." His omission of the cash he had received rendered the true list false, not in that the list was false, but in that the gratuities recited were not the "only thing":

Although LeMaster's listing of the gratuities which he did receive is not false in and of itself, the response may nonetheless serve as a "false statement" for purposes of § 1001. True responses can constitute a false statement if they represent an attempt to conceal additional information required to provide a complete, accurate, and truthful response.<sup>432</sup>

Were the colloquy under oath in court and if the *Aguilar* nexus were shown, this statement consisting of an incomplete list purporting to be complete would be both perjury and obstruction because it is, in fact, false.

True incomplete responsive testimony could also be obstructive where it is true only in an isolated sense rather than in the context of the course of questioning. In a bankruptcy hearing, the petitioner Schafrick sought to conceal from his creditors and estranged wife his receipt and expenditure of some \$16,000. He testi-

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430. *United States v. LeMaster*, 54 F.3d 1224 (6th Cir. 1995).

431. *Id.* at 1227 (emphasis added).

432. *Id.* at 1230 (citing *United States v. Duranseau*, 19 F.3d 1117, 1119 (6th Cir. 1994)).

fied that he had “signed it over” to his mother in payment of a debt, when in fact his mother placed it in an account over which he had access and control. He later admitted that “most of the money I blew.”<sup>433</sup> The court noted that Schafrick’s responsive answers were not subject to *Bronston* and found that while “sign[ing] it over” might be accurate in isolation, the context showed that Schafrick had falsely claimed to have placed the money in his mother’s ownership, rather than in her safekeeping on his behalf.

The questions as well as the answers, and the answers understood as a whole, are crucial to the determination of whether Schafrick’s statements were perjury, and in context there is no doubt that Schafrick meant that he paid his mother for a debt, relinquishing all claims to the funds, when he said that he signed over the check. There was no indication in Schafrick’s answer that the two responses, “My mom” and “I owed her . . .” were independent, unrelated thoughts. Although separately they might have meant something else, as a unit they communicated that Schafrick paid the money to his mother in satisfaction of a debt.<sup>434</sup>

The Second Circuit more recently placed *Schafrick* in the context of *Bronston* in a Section 1623 case growing out of labor corruption.

The “literally true” defense, or the “Bronston Defense,” does not provide the defendant relief in this case. . . . “The purpose of the Bronston rule is to place the burden on the examiner to probe for details during the examination. The rule prevents an examiner from resolving ambiguities in the elicited testimony with a perjury prosecution after the fact.” . . . This Circuit, however, examines not only “the literal truth or falsity of defendant’s words, but also . . . the context in which these words were spoken.” . . . The statements that Hamilton claims are literally true are only literally true in isolation. A reasonable jury could have found beyond a reasonable doubt that these statements were materially untrue in the context of the

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433. See *United States v. Schafrick*, 871 F.2d 300, 301-02 (2d Cir. 1989).

434. *Id.* at 304 (alteration in original).

questions asked of Hamilton. The perjury conviction must therefore stand.<sup>435</sup>

Were the *Aguilar* nexus proven, testimony true in isolation but false in context could support a charge under Section 1503.

None of these applications are novel under the perjury laws, nor are they affected by *Bronston*. Were any such cases to satisfy the requirements of Section 1503 as well, nothing in the application of *Bronston* would alter the application of the obstruction statute.

Finally, true responsive testimony might also constitute obstruction where the witness additionally manipulates the judicial process to cast doubt on the very truth the witness intends to give on the stand. Such a scheme may be found not only in Agatha Christie's *Witness for the Prosecution*, but also in Alabama.<sup>436</sup>

Barfield was a confidential informant for the DEA who both aided Donald Flores in cultivating marijuana and provided the evidence upon which Flores's indictment was based.<sup>437</sup> Barfield then contacted Flores' attorney, denied he had ever witnessed or helped Flores grow marijuana, and provided documents, forged and genuine, with which the government's case might be attacked and his own true prospective testimony impeached. When the government realized Barfield's manipulations, it was therefore unable to call him as a witness against Flores and had to drop certain charges premised on Barfield's prospective testimony. Barfield was convicted under Section 1503.<sup>438</sup>

Had Barfield been called and had he given true testimony thereby impeached, as in Christie's *Witness*, the truth of his presumably responsive testimony in the context of his manipulations would surely have been no bar to culpability under the Omnibus Clause. This would be consistent with a jury instruction in a Section 1001 case where incomplete statements were made to the FBI in the context of other manipulations by the defendant:

To falsify means to make an untrue statement which is untrue at the time made is known to be untrue at the time made. However a statement that is literally true can constitute a false statement if the defendants, through a

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435. *United States v. Hamilton*, 3 F. App'x 7, 11-12 (2d Cir. 2001) (citing *Schafrick* 871 F.2d at 303-04).

436. *See United States v. Barfield*, 999 F.2d 1520 (11th Cir. 1993).

437. *See id.* at 1521.

438. *See id.*

scheme, trick or device, are actively trying to mislead the government.<sup>439</sup>

If truthful responsive testimony concealed information in conjunction with a “scheme, trick, or device,” to borrow a concept from 18 U.S.C. Section 1001(a)(1), that testimony could block the due administration of justice just as did Dwyer’s statements to the FBI.

The trick, scheme, or device might also be employed during the course of testimony to induce the examiner to ask an inaccurate question to which a trivially true denial may be responsively answered.<sup>440</sup> In a bankruptcy hearing, the witness Robbins corrected a corporation’s name in the examiner’s question from the “11th and Meridian” corporation to the “11th and MacArthur” corporation, and then denied that it held any assets. On appeal, Robbins claimed his denial was literally true, since the corporation was in fact the “MacArthur and 11th” corporation, which did have assets, and there was no “11th and MacArthur” at all.<sup>441</sup> His denials were found perjurious since:

The answers to this line of questioning are not unresponsive. They contain “nothing to alert the questioner that he may be sidetracked.” . . .

. . . [Robbins] is not entitled to the protection of *Bronston* because his answers were not “literally true.” They were false. Robbins cannot escape a false oath charge by misleading the questioner with false testimony and then supply literally true answers to a questions based on his false testimony.<sup>442</sup>

Provided the *Aguilar* nexus were proven, these would be grounds for an obstruction charge, not only because the answer is responsive, but because it is true by trick, squarely of one substance with the proffering of falsified documents.

### B. Applying Section 1503 to Elements of the Court

The application of *Bronston* to the Omnibus Clause would leave undisturbed the criminality of responsive incomplete truthful answers by elements of the court, such as lawyers, jurors, and prospective jurors, or talesmen, under Section 1503. These are distinct

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439. *United States v. Dwyer*, 238 Fed. App’x 631, 652 (1st Cir. 2007).

440. *See United States v. Robbins*, 997 F.2d 390 (8th Cir. 1993).

441. *See id.* at 394-95.

442. *Id.* at 395 (citations omitted) (quoting *Bronston v. United States*, 409 U.S. 352, 355 (1973)).

from witnesses giving testimony in a case in that their questioning during the formation of the court is in general not subject to the same probing adversarial cross-examination which is the *sine qua non* of the *Bronston* doctrine. Rather, the integrity of the *voir dire* rests upon the frequently unexamined honesty of the prospective juror. Incomplete truths on *voir dire*, therefore, do not necessarily signal the need for further examination as would non-responsive answers by witnesses in court.

Justice Cardozo wrote in *Clark v. United States* how incomplete truth on the part of officers of the court, rather than witnesses, constitutes contempt of court.<sup>443</sup> When asked on *voir dire* about her employment history, Clark answered truthfully, but omitted her brief employment with the defendant's company.<sup>444</sup> The true but truncated employment answers, however, were distinct from *Bronston* and *Bonds* in that they were responsive, rather than non-responsive. Clark also answered that she could serve free from bias and could decide the case on the evidence and law presented in court.<sup>445</sup> In fact, she introduced extraneous information into the deliberation, announced that no one could convince her of the defendant's guilt, held her hands over her ears when others spoke, and after a week's deliberation was the lone vote against guilt on a hung jury.<sup>446</sup>

In a show cause hearing for contempt, the District Court found the employment answers to have concealed information and the bias answer to be false, with the purpose of obstructing the trial.<sup>447</sup> In confirming Clark's conviction for contempt, Justice Cardozo observed that the role of the juror is at the heart of the court, as distinct from the witness whom the court is to gauge:

There is a distinction not to be ignored between deceit by a witness and deceit by a talesman. A talesman when accepted as a juror becomes a part or member of the court. . . . The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only.

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443. See generally *Clark v. United States*, 289 U.S. 1 (1933).

444. See *id.* at 7-8.

445. See *id.* at 8.

446. See *id.* at 8-9.

447. See *id.* at 9.



His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham.<sup>448</sup>

Distinct remedies apply to distinct roles with relation to the court:

Perjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying falsely. . . . For offenses of that order the remedy by indictment is appropriate and adequate. On the other hand, obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission of perjury. . . . We must give heed to all the circumstances, and of these not the least important is the relation to the court of the one charged as a contemnor. Deceit by an attorney may be punished as a contempt if the deceit is an abuse of the functions of his office . . . , and that apart from its punishable quality if it had been the act of some one else. A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints.<sup>449</sup>

Applying *Bronston* to the Omnibus Clause would not affect the application of Section 1503 to concealments such as Clark's. *Bronston* applies on its terms only to non-responsive witnesses, ordinarily subject to adversary questioning in court. A more recent case echoes *Clark*. Ashqar, defending himself *pro se*, was convicted of contempt for having, *inter alia*, refused to answer the judge or otherwise participate during *voir dire* and other pre-trial procedures.<sup>450</sup> His refusal to answer was in his role as *pro se* attorney rather than witness,<sup>451</sup> though refusing to answer as a witness can also constitute contempt as well as obstruction. Neither instance's being subject to Section 1503 is affected by the application of *Bronston*, as a refusal to answer is distinct from an answer, which is non-responsive, but truthful.

The application of *Bronston* to truthful non-responsive testimony by witnesses in court in testimonial obstruction cases under Section 1503 will apply only to such cases, as in *Bonds*, and will leave undisturbed the perjury and derivative obstruction cases as are already unlawful under those statutes. The application of *Bronston* in

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448. *Id.* at 11 (citations omitted).

449. *Id.* at 11-12 (citations omitted).

450. *United States v. Ashqar*, 582 F.3d 819 (7th Cir. 2009).

451. *See United States v. Proffitt*, 498 F.2d 1124, 1127 (3d Cir. 1974).

testimonial obstruction cases will, however, induce a number of beneficial effects upon the due administration of justice.

## XI. THE DUE ADMINISTRATION OF JUSTICE

Barry Bonds' conviction represents a threat to the due administration of justice as set forth in *Bronston*. It is a perfectly legitimate and laudable goal for prosecutors to seek every tool to induce truth in the witness chair, but that motivation must be and has been checked by the courts' admonition that the cure not be worse than the disease. Section 1503 itself was "designed to protect witnesses."<sup>452</sup>

*Bronston* teaches that "the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying," and that "the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges, of having borne false testimony, is far paramount to that of giving even perjury its deserts."<sup>453</sup> If such policy applies to outright lies, how much more ought it apply to an obstruction which is not "even perjury," especially where "drawing inferences from evasion or silence is an imperfect art at best" and "[i]mposing criminal sanctions on the basis of what is often a speculative venture seems to provide court and jury with virtually unbridled discretion that could well be abused"?<sup>454</sup> Rather, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."<sup>455</sup>

So much has been acknowledged by Judge Rymer in *Spalliero*: "[T]he fear of possible prosecution for evasive or misleading testimony under Section 1503 will burden every witness before a grand jury—even those who are in no position to gauge the effect of their statements on a grand jury investigation about which they have little or no information."<sup>456</sup> And the Ninth Circuit has acknowledged the place of the non-responsive truthful answer as part of the dialogue that focuses facts in the service of the grand jury:

The perjury statute and its goal of truth in our system of justice is served by fostering truthful answers to precise

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452. See *Samples v. United States*, 121 F.2d 263, 265 (5th Cir. 1941).

453. See *Bronston v. United States*, 409 U.S. 352, 359 (1973).

454. Tiersma, *supra* note 413, at 387.

455. See *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

456. *United States v. Spalliero*, 602 F. Supp. 417, 426 (C.D. Cal. 1984).

questions, not by penalizing unresponsive answers to unclear questions. . . .

. . . .

In this case, the defendant's response was literally truthful but apparently unresponsive to the questioning prosecutor's intended meaning. Once the question's ambiguity was narrowed somewhat by further questioning, the defendant gave a literally true and responsive answer consistent with the prosecutor's intended meaning. Rather than constituting an example of the corruption of our system of justice through perjury, this sequence of events shows our system working properly.<sup>457</sup>

The Ninth Circuit in *Sainz* describes a nonresponsive truthful answer, not as a criminal aberration, but as part of a process of focusing the minds of both parties so as to elicit the truth. Where the answer is unresponsive, it may be truthful in the sense of the witness's perception of a question that is perfectly clear to the attorney but ambiguous or out of context to the witness. Were the unresponsive truthful answer criminal upon utterance, provably corrupt only upon a jury's impermissible conjecture<sup>458</sup> and speculation,<sup>459</sup> the process of narrowing and responding would halt, and the search for truth along with it. But when the unresponsiveness signals the alert questioner to press on, the process of focusing upon the truth through dialogue "shows our system working properly."<sup>460</sup>

Yet, the examiner's very "responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination,"<sup>461</sup> is refashioned by *Bonds* as the very impediment that will jail the witness. *Bonds* is the government's escape hatch for the examination that goes awry. At some point in any course of questioning, any witness cannot help but either give too much context or answer too literally to trip the wires of the Omnibus Clause. The "all-embracing" scope of "endeavors" places the criminality of the testimony not intrinsically in the voice of the witness, but rather, in the *post hoc* choice of the prosecutor to recast her obligation to "press on"<sup>462</sup> as an obstruction.

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457. *United States v. Sainz*, 772 F.2d 559, 564 (9th Cir. 1985).

458. *See Bronston*, 409 U.S. at 359.

459. *See id.* at 355 n.3.

460. *Sainz*, 772 F.2d at 564.

461. *Bronston*, 409 U.S. at 358-59.

462. *Id.* at 362.

That is not the law. *Bronston* spoke to all statutes governing the testimony of witnesses in courts at the very incipiency of “testimonial obstruction” under Section 1503. *Bronston* was brought under Section 1621, perhaps because the only appellate court opinion on “testimonial obstruction” as of the indictment was *Essex*, but the Supreme Court recognized the case as the obstruction case it was, if only because there was no falsity to place it under either Section 1621 or 1623, without “go[ing] beyond”<sup>463</sup> the law as only recently articulated by Congress. *Bronston*’s exclusion from the scope of perjury was predicate to the Court’s recognition of the merit of seeking the truth over punishing the wily in light of the chilling effect upon witnesses from jury speculation on “vague rubrics” apart from the lodestars of truth and falsity. From page 358 forward, the Court speaks specifically to testimonial obstruction with full awareness of *Alo* and *Cohn* and their contexts. When the answer is non-responsive but truthful, the examiner is to redouble the effort to “pin the witness down,”<sup>464</sup> rather than rely on prosecuting the witness as the “sole, or even the primary, safeguard against errant testimony.”<sup>465</sup>

*Bonds* has the potential to make Section 1503 the primary strategy. As Judge Rymer foresaw, “to the extent that defendant’s testimony is not perjurious but rather evasive, or misleading, I think that interpreting Section 1503 to obtain a result unobtainable under the perjury statute is ill-advised.”<sup>466</sup> Rather than place the burden of probing questioning upon the examiner, *Bonds* will shift upon the contextual or garrulous witness the burden of proving he’s not stalling, or misdirecting the inquiry if the truth is nuanced or fraught with tensions or paradox. It may be used to punish uncooperative or non-acquiescent attitudes rather than a corrupt endeavor.<sup>467</sup> The “intent to mislead” with non-responsive truths has already been held to be too vague for speculation where the statute provided the tangible standards of truth and falsity,<sup>468</sup> and is less tractable yet where the Omnibus Clause offers no tangible guide.

Under *Bonds*, the perjury statutes with their limitations may be avoided altogether where not only lies, but frustrating answers containing no lies may be gathered into an indictment so general, as in Count Five, that one must await the trial jury instructions to know the charge specifically. While testimonial obstruction charges have

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463. *Id.* at 358.

464. *Id.* at 360.

465. *Id.*

466. *United States v. Spalliero*, 602 F. Supp. 417, 426 (C.D. Cal. 1984).

467. *See* *Murphy*, *supra* note 364, at 1451.

468. *See Bronston*, 409 U.S. at 359.

heretofore been concomitant with and derived from particular allegations of perjury,<sup>469</sup> there would be, following *Bonds*' precedent, no need to charge or prove an associated falsehood at all.

The potential for abuse is evident in a perjury case wherein testimony, upon which two successive Assistant U.S. Attorneys had declined to bring charges at all, was the basis of an indictment brought by a third just as the statute of limitations was to expire.<sup>470</sup> The District Court dismissed the indictment pursuant to *Bronston*, as Landau's grand jury testimony was literally true for the time frame about which he had been questioned, even though it may have been false in terms of a later time frame about which he was not questioned.<sup>471</sup> *Bronston* afforded the *Landau* court the tractable standard of literal truth by which to examine the testimony after five years to discover the mismatch between the actual question and the purported falsity alleged in the belated indictment.

If *Bonds* were to dislodge *Bronston* from applying to testimonial obstruction, a last minute pony-in-there-somewhere shell indictment such as Count Five would permit a prosecutor to avoid any specific allegation of falsehood from the indicting jury or before a trial judge. The prosecutor in the jury instruction phase could target any contextual statement, any throwaway comment, any hint of non-acquiescence to the gist of the inquiry which might burden the attorney with a "single additional question."<sup>472</sup> The trial jury would be tasked with the standardless, and therefore lawless, conjecture about the corruption and multiplicity of motives for uniquely untestable nonresponsive statements.<sup>473</sup> In such circumstances, the motivations for such a statement might fade in time even for the witness, so that even she must reconstruct what might have been for her own defense.

If witnesses bear responsibility for more than the truth, or anything other than the truth, they "might well fear having that responsibility tested by a jury under the vague rubric of 'intent to mislead' or 'perjury by implication.'"<sup>474</sup> *Bronston* will be nullified by stealth if prosecutors give in to the temptation of least resistance and bring a nigh illimitable grab-bag of testimonial crimes under the Omnibus Clause rather than under the perjury statutes designed to the

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469. See, e.g., *United States v. Brown*, 459 F.3d 509, 531 (5th Cir. 2006).

470. See *United States v. Landau*, 737 F. Supp. 778, 779-81 (S.D.N.Y. 1990).

471. See *id.* at 781-84.

472. *Bronston*, 409 U.S. at 358.

473. See *id.* at 355 n.3.

474. *Id.* at 359.

purpose by Congress and given practical application in *Bronston*. Then may every witness fear.

Lost in the glare of Barry Bonds' celebrity is what is at stake for the American adversary system. At stake is whether the *Bronston* doctrine, and indeed the federal perjury statutes themselves, will survive the limitless expansion of the reach of Section 1503. At stake is the quality of federal prosecution of substantive crimes where there is too ready a fix for substandard questioning by resort to an obstruction statute eminently malleable to suit any purpose the government may choose. At stake is the liberty of witnesses who, without counsel, *Miranda* warnings, or Fifth Amendment protection, must tread the line between saying too little, on pain of an allegation of concealing evidence, and saying too much, lest sixty seconds of unsatisfactory explanation be held to obstruct the pace of questioning.

*Bonds* and *Bronston* cannot co-exist, for the witness on the stand is not predestined as 1621 or 1503 as she testifies, and she cannot know if she is assured of *Bronston's* protections until the prosecutor chooses to proceed under *Bonds* or not. If her non-responsive truthful answer is to be privileged as to perjury, it must also be privileged as to all statutes *in pari materia*, else it is not privileged at all. If the questioner is obligated to press forward under *Bronston*, he is relieved of that responsibility if he has Section 1503 as a backstop for casual questioning. Applied to Section 1503, *Bronston* will continue as a prophylactic for alertness and acumen in questioning by the people's lawyers. The people deserve no less assurance of the quality of their representation, and certainly do not deserve the expense of even a single additional trial that can be avoided with a "single additional question."<sup>475</sup>

Due process requires that the witness face a law which clearly outlines the bounds of her duties and liberties. One can only expect that the law will cease to be divided. It will be all one thing or all the other. Unless *Bronston* is applied to Section 1503, one would only expect that the perjury statutes with their protections for the witness will fall into disuse as prosecutors choose the far more amorphous and malleable Omnibus Clause. Yet *Bronston* itself has defined the "due administration of justice," so that a truthful non-responsive answer can be no endeavor, and the mere duty to press on can prove no obstruction.

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475. See *id.* at 358.

XII. EXTRA INNINGS: THE NINTH CIRCUIT  
REVERSES BONDS' CONVICTION

On April 22, 2015, the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, reversed Barry Bonds' conviction for obstruction of justice which had been originally affirmed by a three-judge panel of the Court of Appeals.<sup>476</sup> The eleven-member court issued a terse *per curiam* opinion that there was insufficient evidence that Statement C was material.<sup>477</sup> Four concurring opinions by Judge Kozinski, Judge N. R. Smith, Judge Reinhardt and Judge W. Fletcher, and one dissent by Judge Rawlinson were filed. No concurring opinion commanded a majority of the court. The concurrences articulated widely disparate reasons for the *per curiam* opinion, as well as conflicting views on competing rationales for reversing Bonds' conviction. Such an explosion of ideas will begin a vigorous debate on the scope and application of 18 U.S.C. 1503 to courtroom testimony. It is hoped that the above article may serve as both context and critique for the competing approaches.

The *per curiam* opinion's rationale for reversal is particular to the Ninth Circuit. It would be novel to find an obstruction conviction reversed elsewhere for want of materiality. Unlike Sections 1001, 1621, and 1623, the text of Section 1503 "carries no materiality element."<sup>478</sup> Dual convictions for both obstruction and perjury have been held not to violate the *Blochburger v. United States*<sup>479</sup> requirement that each offense require proof of an element that the other does not.<sup>480</sup> "To show perjury, the government must demonstrate the falsity and materiality of a witness' statements. 18 U.S.C. § 1623. Neither element is needed to prove obstruction of justice under 18 U.S.C. § 1503."<sup>481</sup>

The Ninth Circuit, however, has expressly required materiality in both documentary and testimonial obstruction cases as a limitation on the scope of Section 1503. In *United States v. Ryan*,<sup>482</sup> the Department of Justice prevailed upon an AUSA in Los Angeles to issue subpoenas *duces tecum* in the name of an arbitrarily chosen grand jury without its knowledge and have the documents delivered

476. *United States v. Bonds*, 784 F.3d 582 (9th Cir. 2015) (*en banc*) (*per curiam*).

477. *Id.* at 582 (*per curiam*).

478. *United States v. Ruggiero*, 934 F.2d 440, 446 (2d Cir. 1991).

479. 284 U.S. 299 (1932).

480. *Id.* at 304.

481. *United States v. Langella*, 776 F.2d 1078, 1082 (2d Cir. 1985).

482. 455 F.2d 728 (9th Cir. 1971).



to IRS agents.<sup>483</sup> The IRS was thus enabled to obtain by ruse the documents it could not otherwise obtain. Though the documents were altered prior to delivery to the IRS, the Ninth Circuit reversed the obstruction conviction as there was no relation between the documents sought by the IRS and subject of the grand jury investigation. In passing, the *Ryan* court noted that the documents were “wholly immaterial” even to Ryan’s income tax liability.<sup>484</sup> When *Rasheed* established documentary obstruction under Section 1503 in the Ninth Circuit, the court distinguished *Rasheed*’s conviction from Ryan’s reversal “because the subpoenaed documents [in *Ryan*] were immaterial to the grand jury proceedings.”<sup>485</sup> In 2010, the Ninth Circuit announced in the Tammy Thomas BALCO case: “In light of *Ryan* and *Rasheed*, we conclude that although not expressly included in the text of § 1503, materiality is a requisite element of a conviction under that statute.”<sup>486</sup>

Thus only in the Ninth Circuit could Bonds’ reversal have been grounded upon insufficient evidence of materiality for Statement C. But the opinions in the *Bonds en banc* decision reveal an instability in the application of materiality to testimonial obstruction cases. Judge Kozinski, with four judges joining his concurrence, premises the materiality requirement upon the dangers of Section 1503’s “sweeping coverage” that “does not meaningfully cabin the kind of conduct that is subject to prosecution.”<sup>487</sup>

Making 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 risks chilling zealous advocacy. It also gives prosecutors the immense and unreviewable power to reward friends and punish enemies by prosecuting the latter and giving the former a pass.<sup>488</sup>

For that reason, reading a materiality requirement into Section 1503 “screens out many of the statute’s troubling applications by limiting convictions to those situations where an act ‘has a natural tendency to influence, or was capable of influencing, the decision

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483. *Id.* at 730-32.

484. *Id.* at 734-35 (citation omitted).

485. *United States v. Rasheed*, 663 F.2d 843, 851 (9th Cir. 1981) (citation omitted).

486. *United States v. Thomas*, 612 F.3d 1107, 1129 (9th Cir. 2010).

487. *Bonds*, 784 F.3d at 584 (Kozinski, J., concurring).

488. *Id.* at 584-85 (Kozinski, J., concurring).



of the decisionmaking body.’”<sup>489</sup> Judge Kozinski here quoted the definition of materiality used in *Thomas*, taken from the Ninth Circuit’s model jury instructions for materiality, and ultimately derived from Justice Scalia’s opinion in *Kungys v. United States*.<sup>490</sup> Applying the *Kungys/Thomas* test, Judge Kozinski found that Statement C “says absolutely nothing pertinent to the subject of the grand jury’s investigation.”<sup>491</sup>

Judge N. R. Smith, joined by three other judges (including Judge Callahan who had also joined Judge Kozinski), equates the materiality requirement with the “nexus” requirement of *Aguilar*, which is in turn rooted in the text of Section 1503: “The endeavor must have the natural and probable effect of interfering with the due administration of justice.”<sup>492</sup> For “evasive or misleading”<sup>493</sup> statements, Judge N. R. Smith refines the test and confines culpability to statements which “completely thwart[ ] the investigative nature of the tribunal,”<sup>494</sup> amounting to “a flat refusal to testify,”<sup>495</sup> or “feigned forgetfulness”<sup>496</sup> which “‘close[s] off *entirely* the avenue of inquiry being pursued by’ the grand jury.”<sup>497</sup> Thus, “[n]o rational juror could have found that Statement C amounted to a refusal to testify, such that Bonds’s testimony thwarted the grand jury’s investigative function.”<sup>498</sup>

Judge Reinhardt’s concurrence supports Judge N. R. Smith’s definition of materiality rather than Judge Kozinski’s definition, but declines to endorse Judge N. R. Smith’s refined rule for evasive non-responsive answers, or accept that even refusals to testify are subject to Section 1503.<sup>499</sup> Rather, “I would simply hold that Bonds’ answer in no way constitutes a violation of § 1503 because it is non-responsive and thus nonmaterial, and that his prosecution for the charged offense was therefore wholly unwarranted under

489. *Id.* at 585 (Kozinski, J., concurring) (citing *Thomas*, 612 F.3d at 1124 (additional citations omitted)).

490. See *Kungys v. United States*, 485 U.S. 759, 770 (1988).

491. *Bonds*, 784 F.3d at 585 (Kozinski, J., concurring).

492. *Id.* at 587 (N. R. Smith, J., concurring) (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)).

493. *Id.* at 589 (N. R. Smith, J., concurring).

494. *Id.* (N. R. Smith, J., concurring)

495. *Id.* (N. R. Smith, J., concurring) (quoting *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir. 1979)).

496. *Id.* (N. R. Smith, J., concurring) (quoting *United States v. Cohn*, 452 F.2d 881, 884 (2d Cir. 1971)).

497. *Id.* (N. R. Smith, J., concurring) (quoting *United States v. Brown*, 459 F.3d 509, 531 (5th Cir. 2006)).

498. *Id.* (N. R. Smith, J., concurring).

499. See *id.* at 590-94 (Reinhardt, J., concurring).

the law.”<sup>500</sup> Judge Reinhardt’s preferred disposition of the case is to rule testimonial obstruction out of the scope of Section 1503 altogether based upon its statutory history and proper interpretation.<sup>501</sup>

Like Judge Reinhardt, Judge Fletcher would radically restrict the scope of Section 1503 based upon its text, history, and principles of statutory interpretation.<sup>502</sup> In Judge Fletcher’s view, the definitions of materiality advanced by Judges Kozinski and N. R. Smith admit of so many exceptions that the “terrifyingly clear”<sup>503</sup> results of the government’s reading of Section 1503 cannot be thwarted by reading materiality into the statute.<sup>504</sup>

An attorney who provides a truthful but evasive answer to an interrogatory in civil litigation often does so in the hope that his answer will ‘influence the decisionmaking person’ who receives it. If there is a reasonable chance that the hope will be realized, the attorney is a criminal. An appellate attorney who answers during oral argument, ‘I was not the trial attorney,’ sometimes knows what happened at trial but gives that answer in the hope that the judge will not pursue the matter. This attorney, too, may be a criminal.<sup>505</sup>

Judge Rawlinson’s dissent rejects any failure of proof that Statement C was material. The jury had Agent Novitzsky’s testimony that

the inconsistencies between Bonds’ testimony and other evidence before the grand jury regarding the relationship between the athletes and the steroid distributors, including the evasions, required the investigators to conduct additional inquiries that would not have been necessary had Bonds given non-evasive testimony. . . . Indeed, drawing all inferences in favor of the government, a reasonable juror could reasonably conclude that Bonds’ evasive testimony diverted the investigation, thereby impeding the administration of justice. . . . Sufficient evidence supports the jury’s

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500. *Id.* at 591-92 (Reinhardt, J., concurring).

501. *See id.* at 590-94 (Reinhardt, J., concurring).

502. *Id.* at 594-98 (Fletcher, J., concurring).

503. *Id.* at 594 (Fletcher, J., concurring).

504. *Id.* at 595 (Fletcher, J., concurring).

505. *Id.* (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)).

considered verdict, and the verdict warrants deference rather than second-guessing.<sup>506</sup>

Despite the near unanimity of result, the opinions reveal fault lines on materiality that will make the *Bonds* reversal difficult to apply in the next vexing testimonial obstruction case in any circuit. There is no consensus on what materiality means. Each opinion draws a different line between lawful and unlawful conduct. Judge Reinhardt chooses Judge N. R. Smith's definition, but rejects its corollary. Judge Fletcher rejects both definitions and Judge Rawlinson finds insufficient deference to the jury under any definition. With the principal rationale for decision this unstable, the application of *Bronston* to Section 1503 takes on added significance. The concurring and dissenting opinions' views of *Bronston* draw lines for that debate.

Judge Kozinski quoted *Bronston* in passing that "it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive."<sup>507</sup> But it is clear that Judge Kozinski rejects *Bronston* as he hypothesized a culpable alternative answer to Statement C: "Had the answer been 'I'm afraid of needles,' it would have been plausible to infer an unspoken denial, with the actual words serving as an explanation or elaboration."<sup>508</sup> Judge Kozinski's alternative is no different from the *Bonds* three-judge panel's "I don't have a driver's license" example.<sup>509</sup> This culpability by negative implication is exactly what *Bronston* forbids. Rather, Judge Kozinski would find immaterial, and thus non-culpable,

[a]n irrelevant or wholly non-responsive answer [that] says nothing germane to the subject of the investigation, whether it's true or false. For example, if a witness is asked, 'Do you own a gun?' it makes no difference whether he answers 'The sky is blue' or 'The sky is green.' That the second statement is false makes it no more likely to impede the investigation than the first.<sup>510</sup>

Ironically, Judge Kozinski compounds and confounds the categories of answers subject or not subject to Section 1503. "Wholly

506. *Id.* at 603 (Rawlinson, J., dissenting).

507. *Id.* at 584 (Kozinski, J., concurring) (quoting *Bronston v. United States*, 409 U.S. 352, 358 (1973)).

508. *Id.* at 585 (Kozinski, J., concurring).

509. *United States v. Bonds*, 730 F.3d 890, 895 (9th Cir. 2013), *rev'd*, 784 F.3d 582 (2015) (en banc).

510. *Id.* at 586 (Kozinski, J., concurring).

non-responsive” answers, such as the color of the sky, are not “germane” to the “investigation” of gun ownership and are immaterial.<sup>511</sup> On the other hand, *partially* [?] non-responsive answers, *e.g.*, “I’m afraid of needles,”<sup>512</sup> or “I don’t have a driver’s license,”<sup>513</sup> or “[The company had an account there for about six months, in Zurich,”<sup>514</sup> presumably are material and thus subject to Section 1503. Judge Kozinski apparently equates “non-responsive” to “not germane” rather than whether the answer is addressing the question asked. Paradoxically, Judge Kozinski’s “needles” and “sky” examples criminalize the very “not entirely responsive” answers of “the most earnest witnesses” on whose behalf he invokes materiality.<sup>515</sup> The lines of culpability lie athwart *Bronston* and hardly meet “the constitutional requirement that individuals have fair notice as to what conduct may be criminal.”<sup>516</sup>

Judge N. R. Smith invokes that “fair warning” rooted in *Aguilar*<sup>517</sup> as his primary argument that “Congress could not have intended § 1503 to be so broadly applied as to reach a single truthful but evasive statement such as Statement C.”<sup>518</sup> This is precisely the *Bronston* principle. Judge N. R. Smith notes that while *Bronston* was a perjury case, “[e]xtending § 1503’s reach to transient evasive or misleading statements would obviate the prosecutor’s duty to thoroughly examine the witness.”<sup>519</sup> As the natural and probable effect of such an answer “is merely to prompt follow-up questions,”<sup>520</sup> “Statement C did not have the natural or probable effect of interfering with the due administration of justice, because the Government had a duty to clarify any single misleading or evasive statement Bonds made.”<sup>521</sup> Judge Reinhardt added:

The problems created by the misuse of § 1503 by overzealous prosecutors to punish witnesses for what they say in court are all too evident from the facts of this case. It is time for them to cease using that section as a substitute for

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511. *Id.* (Kozinski, J., concurring).

512. *Id.* at 585 (Kozinski, J., concurring).

513. *Bonds*, 730 F.3d at 895 (three judge panel).

514. *Bronston v. United States*, 409 U.S. 352, 354 (1973).

515. *Bonds*, 784 F.3d at 585-86 (en banc) (Kozinski, J., concurring) (quoting *Bronston*, 409 U.S. at 358).

516. *Id.* at 585 (Kozinski, J., concurring) (citations omitted).

517. See *United States v. Aguilar*, 515 U.S. 593, 600 (1995).

518. *Bonds*, 784 F.3d at 587-88 (N. R. Smith, J., concurring).

519. *Id.* at 588 (Kozinski, J., concurring) (quoting *Bronston*, 409 U.S. at 358).

520. *Id.* (Kozinski, J., concurring); see *id.* at 590-91 (Reinhardt, J., concurring).

521. *Id.* at 588 (Kozinski, J., concurring).

vigorous cross-examination or for the criminal statutes that properly apply to in-court testimony.<sup>522</sup>

As part of Judge Fletcher's reasons for substantially confining the reach of Section 1503, he compares the disparity between the penalty for obstruction, up to ten years, with the penalty for perjury, only up to five years.<sup>523</sup> Under the government's view, truthful evasive testimony is subject to twice the penalty for lying under oath. Noting the parallels between the testimony of Bronston and Bonds, Judge Fletcher invokes the *Bronston* Court's doubt that the Congress could have intended drastic sanctions "to cure a testimonial mishap that could readily have been reached with a single additional question by counsel."<sup>524</sup> Judge Fletcher adopts *Bronston's* requirement that the questioner flush out the whole truth from even the shrewdly evasive witness so as not to subject juries to conjecture or witnesses to confusion and fear:<sup>525</sup>

The government and the principal concurrence both brush *Bronston* aside. That is not so easily done, for the Court's reasoning is as applicable to this case as to Bronston's. In either case, "[a] jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner." "To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know." Further, and perhaps more important, if the concurrence is right about the meaning of "corruptly" in § 1503(a), the Court's careful parsing of the perjury statute in *Bronston* was wasted effort. If the concurrence is right, a prosecutor seeking to convict someone who may or may not have testified truthfully will never need to pursue a perjury conviction. The prosecutor can get an obstruction of justice conviction, carrying twice the penalty, for half the effort.<sup>526</sup>

Judge Rawlinson's dissent rejects *Bronston* as being confined to perjury cases, as being inapplicable to grand jury proceedings (though *Bronston* applies to Section 1623), and as inconsistent with

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522. *Id.* at 593 (Reinhardt, J., concurring).

523. *See id.* at 598-99 (Fletcher, J., concurring).

524. *Id.* at 599 (Fletcher, J., concurring) (quoting *Bronston*, 409 U.S. at 358).

525. *Id.* (Fletcher, J., concurring) (citing *Bronston*, 409 U.S. at 358-59).

526. *Id.* at 599-600 (Fletcher, J., concurring) (internal citations omitted) (quoting *Bronston*, 409 U.S. at 358, 362).

the text of Section 1503 which makes no distinction between truth and falsity.<sup>527</sup>

Thus the danger to the *Bronston* doctrine posed by a *Bonds*-like prosecution remains despite the reversal of Bonds' conviction. A reversal for insufficient evidence is vulnerable to further review,<sup>528</sup> especially where the standard for sufficiency is fractured among the disparate views of materiality. Given the improbability that Judge Reinhardt's and Judge Fletcher's tightly reasoned statutory arguments could gain traction nearly fifty years after *Alo* and *Cohn*, this writer believes that only Judge Fletcher's adoption of *Bronston*'s reasoning for Section 1503 can guard against the government's "terrifyingly clear"<sup>529</sup> vision of Section 1503 as its route to a conviction for a procedural crime if one cannot be gained for a substantive crime. After all, *Bronston* was written to apply to Section 1503 from the beginning. For all of these reasons, it is hoped that the above offering may be of some use as the debate on the *Bonds* case goes yard.

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527. See *id.* at 607-10 (Rawlinson, J., dissenting).

528. See *Coleman v. Johnson*, 132 S. Ct. 2060 (2012).

529. *Bonds*, 784 F.3d at 594 (Fletcher, J., concurring).