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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

16 UNITED STATES OF AMERICA,)
17 Plaintiff,)
18 v.)
19 BARRY LAMAR BONDS,)
20 Defendant.)
21)
22)
23)
24)
25)
26)
27)
28)

Criminal No. CR 07-0732 SI

**UNITED STATES' RESPONSE TO
DEFENDANT'S MOTION TO
DISMISS COUNTS I, II, V, VII, VIII,
IX, XI, XII, XIV, AND XV OF THE
SUPERSEDING INDICTMENT**

Date: October 24, 2008
Time: 11:00 a.m.
Judge: Hon. Susan Illston

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INTRODUCTION

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2 Defendant Barry Bonds moves to dismiss nine counts of the Superseding
3 Indictment on multiple grounds. He asserts that Count One should be dismissed because
4 it fails to include the word “material.” As Bonds acknowledges, however, the Ninth
5 Circuit has squarely held that “[a]lthough materiality is an essential element of a
6 conviction for perjury, the government need not allege materiality if the facts pleaded in
7 the indictment ‘warrant the inference of materiality.’” *United States v. Duran*, 41 F.3d
8 540, 544 (9th Cir. 1994) (quoting *United States v. Oren*, 893 F.2d 1057, 1063-64 (9th Cir.
9 1990)) (emphasis deleted). Here, the superseding indictment makes clear that it alleges
10 that the false statements alleged in Count One are material by explicitly stating the
11 purpose and focus of the grand jury’s investigation. See Indictment ¶¶ 4-5. Although
12 Bonds contends that *Duran* is no longer good law in light of *United States v. Gaudin*, 515
13 U.S. 506 (1995), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Ninth Circuit has
14 recently reaffirmed *Duran*’s holding that an indictment for making false statements need
15 not allege materiality. See *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007).
16 Nevertheless, the typographical omission of the word “material” from Count One will be
17 remedied, either by obtaining a second superseding indictment or obtaining a new
18 indictment solely on that count that could be joined with the current indictment for trial.

19 Bonds’s remaining challenges are without merit. Bonds’s argument that Counts
20 Six and Seven are multiplicitous should be rejected because he previously argued that a
21 count containing both the statements alleged in those counts was duplicitous. In any
22 event, Counts Six and Seven are not multiplicitous because they do not involve identical
23 answers to identical questions and because Bonds’s false answers to the two questions
24 impaired different aspects of the grand jury’s investigation. Bonds’s effort to renew his
25 claims that the questions that form the basis for several counts of the indictment are
26 “fundamentally ambiguous” should also be rejected. As explained in the government’s
27 opposition to Bonds’s initial motion to dismiss and in Part II of this opposition, each
28 count rests on Bonds’s answers to unambiguous questions, and Bonds’s contrary

1 contention ignores the plain language of the prosecutor's questions, the context in which
2 they were asked, and Bonds's failure to express any confusion when answering them.
3 Finally, Bonds's new challenge to the obstruction-of-justice count, Count Fifteen, rests on
4 a misapprehension of the allegations of that count. Count Fifteen alleges that Bonds's
5 grand jury testimony as a whole obstructed the grand jury's inquiry, and therefore any
6 ambiguity, duplicity, or multiplicity in the other fourteen counts of the indictment does
7 not require dismissal of that count.

8 **I. Counts six and seven are not multiplicitous.**

9 Bonds asserts (Mot. at 4-5) that Counts Six and Seven are multiplicitous because
10 both counts rest on the same question and answer. At the outset, Bonds should be
11 foreclosed from asserting that these two counts are multiplicitous because he has
12 previously alleged that the inclusion of these two statements in Count Three of the
13 original indictment rendered that count duplicitous. Both cannot be true. If, as this Court
14 found in deciding Bonds's original motion to dismiss, the government improperly joined
15 two or more false statements into Count Three of the original indictment (rendering that
16 count duplicitous), then separating two of the duplicitous false statements into separate
17 counts in the superseding indictment cannot create multiplicitous allegations. Put another
18 way, either the government improperly charged the two statements in a single duplicitous
19 count or it improperly charged the two statements in separate, multiplicitous counts, but it
20 cannot have done both. Bonds chose to claim that the former Count Three was
21 duplicitous, and he should not now be heard to argue that Counts Six and Seven are
22 multiplicitous.

23 If the Court reaches Bonds's multiplicity challenge, it should be rejected. In
24 support of his contention, Bonds relies on cases addressing whether Congress intended a
25 single act to give rise to multiple violations of the same statute, *see United States v.*
26 *Zalapa*, 509 F.3d 1060 (9th Cir. 2007), *United States v. Keen*, 104 F.3d 1111 (9th Cir.
27 1997), and he ignores Ninth Circuit decisions that directly address the question whether
28 multiple false statements may constitute multiple violations of the same statute. Under

1 the test set by applicable Ninth Circuit decisions, and in the context of the entire grand
2 jury transcript, Counts Six and Seven are not multiplicitous, and Bonds's motion to
3 dismiss Count Seven should be denied.

4 "Multiplicity is the charging of a single offense in more than one count." *United*
5 *States v. Segall*, 833 F.2d 144, 146 (9th Cir. 1987) (quoting *United States v. Israelski*, 597
6 F.2d 22, 24 (2d Cir. 1979)). To determine whether multiple counts charging false
7 statements or perjury are multiplicitous, the Ninth Circuit uses a two-part test. *See United*
8 *States v. Salas-Camacho*, 859 F.2d 788, 791 (9th Cir. 1988). First, two or more false
9 statement or perjury counts are not multiplicitous unless they charge "identical false
10 statements... made in response to identical questions." *United States v. Stewart*, 420
11 F.3d 1007, 1013 (9th Cir. 2005) (quoting *United States v. Olsowy*, 836 F.2d 439, 443 (9th
12 Cir. 1987)). Second, even if multiple counts allege identical statements made to identical
13 questions, the counts are not multiplicitous if the second false statement further impaired
14 the operations of government, *Salas-Camacho*, 859 F.2d at 791, or in this case, the grand
15 jury's investigation.

16 Here, neither prong of the test is met. In the questioning that led to the statement
17 alleged in Count Six, the prosecutor asked Bonds about the first page of Exhibit 503.
18 That page contained the following notation: "G' 1 Box off season & 2 Box season:
19 \$1500.00." Directing Bonds's attention to this notation, the prosecutor asked whether
20 Greg Anderson ever gave Bonds an item that he referred to as G or the G. Bonds first
21 gave an evasive answer and then denied that he received any boxes labeled "G." Grand
22 Jury Transcript (GJTR) at 47. To conclude the questioning on this notation on the
23 document, the prosecutor asked the question referenced in Count Six:

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

26 GJTR at 48. Bonds answered, "No." *Ibid.* This answer forms the basis for Count Six.

27 The questioning leading to the allegations of Count Seven occurs 50 pages later in
28 the grand jury transcript and concerned a different page of Exhibit 503. *See* GJTR at 96-

1 97. In that questioning, the prosecutor asked Bonds about a calendar page from
2 December 2001 that bore the initials “BB,” as well as notations such as “clear,” “1 cc T
3 200 mg,” and “.25 G.” GJTR at 96. The prosecutor first asked Bonds whether he was
4 getting “items” – referring to “the flax seed oil” and the cream – during the month of
5 December 2001. Bonds answered that question, “No.” The prosecutor then asked about
6 an entry that appeared on each Monday of the calendar stating “1 cc T 200 mg” and “.25
7 G.” In an effort to determine whether these entries reflected the administration of illegal
8 steroids to Bonds during December 2001, the prosecutor asked whether Bonds obtained
9 either testosterone or growth hormone during December 2001. Bonds answered, “Not at
10 all” to both questions. His answer to the prosecutor’s question on growth hormone forms
11 the basis for Count Seven.

12 As the context shows, these two counts involved separate lines of inquiry and
13 separate aspects of the grand jury’s investigation. In the questioning leading to Count
14 Six, the prosecutor sought to determine whether an undated notation on a document (page
15 1 of Exhibit 503) showed that Anderson had supplied Bonds with boxes containing
16 human growth hormone, an illegal substance. Because the notation was undated, the
17 prosecutor’s question was not focused on any particular time period. In the questioning
18 leading to the answer that forms the basis for Count Seven, the prosecutor asked Bonds
19 about a different document, the calendar page dated December 2001. The prosecutor’s
20 questions sought to determine whether the entries on the calendar reflected Bonds’s use
21 of testosterone or human growth hormone in a particular time frame, December 2001.

22 In sum, Count Six and Count Seven do not involve identical questions because
23 they arise from questioning about different documents, and the question underlying Count
24 Seven relates to a specific time period. Although Bonds’s negative answer to the
25 question alleged in Count Seven was consistent with his negative answer alleged in Count
26 Six, the prosecutor’s questions were not an effort to “bludgeon a witness who is lying by
27 repeating and rephrasing the same question.” *Gebhard v. United States*, 422 F.2d 281,
28 289 (9th Cir. 1970). Instead, as is typical in grand jury questioning, the prosecutor sought

1 to sharpen the inquiry by focusing on a specific time period and using different
2 documents in an effort to refresh the witness's recollection or induce him to concede that
3 the document required him to change his prior testimony. Thus, the consistency between
4 Bonds's false statements in Counts Six and Seven is not a result of identical questions
5 posed by the prosecutor but of the prosecutor's effort to use different questions and
6 documents to elicit the truth.

7 Moreover, because the questioning underlying each count rested on a different
8 document, each of Bonds's allegedly false answers impaired a different aspect of the
9 grand jury's investigation. Bonds's false answer to the question alleged in Count Six
10 impaired the grand jury's ability to understand the meaning of the first page of Exhibit
11 503, and Bonds's false answer to the question alleged in Count Seven impaired the grand
12 jury's ability to determine the meaning of the entries on the December 2001 calendar
13 page. For these reasons, the two counts are not multiplicitous.

14 **II. None of the perjury counts rests on fundamentally ambiguous statements.**

15 Bonds renews his contention (Mot. at 5-13) that seven of the questions that led to
16 the false statements alleged in the indictment are so "fundamentally ambiguous" that they
17 cannot support the perjury counts. For the reasons stated in the government's opposition
18 to Bonds's first motion to dismiss, that contention should be rejected. First, Bonds's
19 claim is premature, because questions concerning the meaning of a question and the
20 defendant's interpretation of it are ordinarily left to the jury. For that reason, a court may
21 not ordinarily determine before trial whether questions and answers in a perjury
22 indictment are fundamentally ambiguous. Second, whether a question that elicits an
23 allegedly false answer is ambiguous depends on the context of the question and answer.
24 Despite the government's detailed effort in its opposition to Bonds's prior motion to
25 dismiss to explain the context of the questions and answers charged in the indictment,
26 Bonds makes no effort to situate the questions the prosecutors asked or the answers he
27 gave within the context of his grand jury testimony as a whole. To reiterate, that context
28 includes the fact that the prosecutor specifically told Bonds that if he did not understand a

1 question, he could consult with counsel or ask the prosecutor to rephrase it. GJTR at 5-6.
2 Bonds never said he was confused about, or asked the prosecutor to rephrase, a question.
3 Finally, even viewed outside of the context in which they were asked, none of the
4 questions asked Bonds was so fundamentally ambiguous that it cannot support a perjury
5 prosecution.

6 **A. Applicable legal principles**

7 “Generally speaking, the existence of some ambiguity in a falsely answered
8 question will not shield the respondent from a perjury or false statement prosecution.”
9 *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003); *United States v. McKenna*,
10 327 F.3d 830, 841 (9th Cir. 2003). Instead, when a perjury indictment rests on an
11 allegedly ambiguous question, “[i]t is ordinarily for the jury to decide which construction
12 the defendant placed on a question.” *McKenna*, 327 F.3d at 841; *see United States v.*
13 *Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004) (“Ordinarily, the finder of fact decides
14 which of the plausible interpretations of an ambiguous question the defendant
15 apprehended and responded to.”). Only when “a question is ‘excessively vague,’ or
16 ‘fundamentally ambiguous,’ the answer may not, as a matter of law, form the basis for a
17 prosecution for perjury or false statement.” *Culliton*, 328 F.3d at 1078 (quoting *United*
18 *States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987)).

19 A “question is not fundamentally ambiguous simply because the questioner and
20 respondent might have had different interpretations.” *Camper*, 384 F.3d at 1076.
21 Instead, to determine whether a question is “fundamentally ambiguous,” a court must
22 examine whether the “context of the question and other extrinsic evidence relevant to the
23 defendant’s understanding of the question may allow the finder of fact to conclude that
24 the defendant understood the question as the government did and, so understanding,
25 answered falsely.” *Id.*; *accord United States v. Bussell*, 414 F.3d 1048, 1057 (9th Cir.
26 2005). After looking at the context and relevant extrinsic evidence, a court may find a
27 question fundamentally ambiguous only when “‘men of ordinary intelligence’ cannot
28 arrive at a mutual understanding of its meaning.” *United States v. Culliton*, 328 F.3d at

1 1078 (quoting *United States v. Boone*, 951 F.2d 1526, 1534 (9th Cir. 1991)). In short, to
2 prevail on his motion, Bonds must show that in light of the context of the questions and
3 any relevant extrinsic evidence, a jury could not find that a reasonable person would have
4 “understood the question[s] as the government did.” This he fails to do; in fact, the grand
5 jury transcript demonstrates that Bonds understood the questions perfectly well and chose
6 his answers carefully, if falsely.

7 **B. The questions asked Bonds were not fundamentally ambiguous.**

8 **1. Count Two**

9 In the questioning leading up to the statement alleged in Count Two, the
10 prosecutor confronted Bonds with a document showing that “Barry B.” tested positive for
11 two anabolic steroids in November 2000. The prosecutor then asked, “So I’m going to
12 ask you in the weeks and months leading up to November 2000, were you taking
13 steroids?” Bonds answered, “no.” The prosecutor continued, “or anything like that?”
14 and Bonds answered, “No, I wasn’t at all. I’ve never seen these documents. I’ve never
15 seen these papers.” The underlined portion of the answer forms the basis for Count Two.
16 Although Bonds’s first answer (“no”) was charged as a separate specification of perjury
17 in the first indictment, the superseding indictment alleges only that the statement, “No, I
18 wasn’t at all” is perjurious.

19 Bonds argues (Mot. at 8) that the question alleged in Count Two is ambiguous in
20 two respects. First, Bonds contends that the question leading up to Bonds’s answer, “No,
21 I wasn’t at all,” is fundamentally ambiguous because the prosecutor failed “to reasonably
22 identify what substances can be deemed ‘anything like’ steroids.” Second, Bonds asserts
23 (Mot. at 8) that the question “in the weeks and months leading up to November 2000,
24 were you taking steroids?” is “fundamentally ambiguous as to time period at issue.” He
25 contends that “a truthful answer to the ‘weeks’ question could be different than a truthful
26 answer to the ‘months’ question.”

27 These contentions ignore the context of the questions and answers alleged in
28 Count One and the grand jury examination as a whole. First, as the indictment itself

1 makes clear, the questions that led to the statement that forms the basis for Count One
2 arose out of the prosecutor's effort to examine Bonds about the meaning of two
3 documents that, taken together, show that Bonds tested positive for steroids. At trial, the
4 government will seek to introduce those documents and present testimony to explain their
5 meaning. Until the jury sees those documents and hears the explanatory testimony – that
6 is, until the jury understands the context of the questions – any inquiry into whether the
7 questions were ambiguous is premature.

8 Second, the additional context supplied by Bonds's grand jury testimony as a
9 whole shows that the questions are not ambiguous. Throughout his testimony, Bonds
10 denied that he ever knowingly took steroids. For that reason, he could not have perceived
11 the prosecutor's question about the "weeks and months leading up to November 2000" as
12 ambiguous; as Bonds's answer shows, he did not distinguish between "weeks" and
13 "months," because his answer would have been the same for any time period. Third, in
14 the colloquy that forms the basis for Count One, Bonds denied that he ever knowingly
15 took steroids provided by Anderson. At trial, the government's evidence will show that
16 Bonds received steroids from Anderson in the period before the November 2000 positive
17 drug test, and that evidence raises the inference that Anderson gave Bonds the steroids
18 that caused him to test positive in November 2000. Thus, the questions that led to the
19 false statement alleged in Count Two simply sought to narrow the focus of earlier
20 questions, including the question alleged in Count One.

21 Even divorced from their context, the questions that led to the false statement
22 alleged in Count Two are not fundamentally ambiguous. The prosecutor's question
23 plainly sought to determine why Bonds apparently tested positive for anabolic steroids in
24 November 2000, and the phrases "weeks and months" and "anything like that" must be
25 interpreted in that context. Thus, the "weeks and months" question is reasonably
26 interpreted to ask Bonds whether he took steroids in the period before the test that
27 resulted in the positive test. Likewise, the phrase "anything like that" asks whether Bonds
28 took anything like steroids that could have led to a positive steroid test. Bonds's

1 straightforward answers (“no,” “not at all”) show that he understood the questions and did
2 not believe they were ambiguous.

3 **2. Count Five**

4 In the questions that led to the false statement alleged in Count Five, the
5 prosecutor sought to ascertain whether Anderson ever injected Bonds with anything. The
6 prosecutor first directly asked Bonds, “Did Greg [Anderson] ever give you anything that
7 required a syringe to inject yourself with?” Bonds evaded this question by referring to his
8 “personal doctor” and his friendship with Anderson. In an effort to obtain an answer to
9 his question, the prosecutor made clear that he was not referring to the Giants team
10 physician, anyone involved in the surgeries that Bonds had undergone, or Bonds’s
11 personal physician. After excluding these individuals from the scope of his question, the
12 prosecutor asked whether “other individuals like Mr. Anderson or any associates of his”
13 had ever injected Bonds with anything. Bonds argues (Mot. at 9) that this question is
14 fundamentally ambiguous because “it is impossible to determine the identity of the
15 individuals the prosecutor’s question reasonably placed in issue.”

16 This contention should be rejected, for at least two reasons. First, taken as a
17 whole, the portion of the questioning quoted in the indictment makes clear that the
18 prosecutor sought to inquire whether Anderson had ever injected Bonds with anything.
19 Because Bonds failed to answer that straightforward question, the prosecutor clarified
20 that he was not asking whether any medical personnel of any kind had ever injected
21 Bonds with anything. The prosecutor then repeated the gist of his original question.
22 Bonds’s response (“no, no”) shows that he understood the prosecutor’s ultimate question
23 to refer to Anderson. Second, even if the question was insufficiently specific in
24 narrowing the universe of persons to whom it refers, the question clearly asks whether
25 Anderson ever injected Bonds with anything. Thus, even if Bonds could not have
26 understood who the “individuals” and “associates” were, his answer of “no” means that
27 neither Anderson nor any “associate” ever injected him with anything. Accordingly, that
28 answer is false if the evidence shows that Anderson injected Bonds. *See United States v.*

1 *Boone*, 951 F.2d at 1535 (ambiguous portion of “disjunctive” question does not render
2 entire question ambiguous). Indeed, as noted above, Bonds denied that he ever took
3 steroids so the inclusion of the phrase “or any associates of his” did not render the
4 question ambiguous for Bonds.

5 **3. Count Eight**

6 Count Eight charges that Bonds made a material false statement when he answered
7 “No” to the question, “In January of 2002, then, again, just to be clear, you weren’t
8 getting any testosterone or growth hormone from Mr. Anderson during that period of
9 time?” In his initial motion to dismiss, Bonds did not argue that this question was
10 fundamentally ambiguous. Bonds now argues, however (Mot. at 9), that “the compound
11 nature of the question count [sic] renders it sufficiently duplicitous and misleading to
12 require dismissal.”

13 As set forth above, however, the Ninth Circuit has held that a question phrased in
14 the disjunctive that contains an ambiguous phrase is not “fundamentally ambiguous” as
15 long as the remainder of the question is sufficiently precise. *See Boone*, 951 F.2d at 1535.
16 Here, there is no ambiguity in the question because it did not ask Bonds to choose
17 between two alternatives; rather, it asked whether either of two things was true: 1) did
18 Anderson give Bonds testosterone or 2) did Anderson give Bonds growth hormone.
19 Bonds’s answer of “no” is a denial that Anderson had given him either drug. Moreover,
20 Bonds’s unambiguous answer shows that he comprehended the question completely.

21 **4. Count Nine**

22 In the colloquy leading to the question that forms the basis for Count Nine, Bonds
23 described how Anderson came to the ballpark and rubbed “some lotion-type stuff” on
24 Bonds’s arm and gave him something that Anderson called “flax seed oil.” In response,
25 the prosecutor asked, “When did that happen for the first time?” Without expressing any
26 doubt about the meaning of the prosecutor’s question, Bonds responded, “Not until 2003,
27 this season.” Bonds argues (Mot. at 10) that the word “that” in the prosecutor’s question
28 is ambiguous because “there is no reliable means for determining the event to which the

1 prosecutor referred when he inquired about ‘that’ having happened for the first time.”

2 In fact, the question simply follows up on Bonds’s own description of an incident
3 in which Anderson rubbed him with a cream and gave him “flax seed oil.” That is how
4 Bonds described the incident, and the prosecutor’s question is merely an effort to
5 determine when it occurred. In other words, the defendant set the context for Count
6 Nine's question in his previous answer; it is illogical to argue now that Bonds did not
7 understand the issue he himself raised. Moreover, even if the question contained some
8 ambiguity, it at most raises a question for the jury to determine based on the full context
9 of the questioning and other evidence presented by the government at trial.

10 5. Count Eleven

11 Count Eleven arises out of the prosecutor’s effort to confirm that Anderson never
12 gave Bonds anything other than vitamins before the 2003 season. After Bonds evaded the
13 prosecutor’s first effort to ask that question, the prosecutor asked it again, “prior to last
14 season [*i.e.*, the 2003 season], you never took anything that [Anderson] asked you to take,
15 other than vitamins.” Bonds answered, “Right. We didn’t have any other discussions.”
16 The prosecutor continued, “No oils like this or anything like this before?” Bonds
17 answered, “No, no, no, not at all. Not at all.” Count Four of the first indictment charged
18 that both of Bonds’s answers during this colloquy – “Right. We didn’t have any other
19 discussions” and “No, no, no, not at all. Not at all” – were material false statements.
20 Count Eleven of the superseding indictment sets forth the entire colloquy but alleges only
21 that Bonds’s answer, “Right” constitutes a material false statement. Accordingly, the
22 question that forms the basis for Count Eleven is “prior to last season, you never took
23 anything that [Anderson] asked you to take, other than vitamins?”

24 Bonds argues (Mot. at 10-11) that the prosecutor’s question could refer to water or
25 over-the-counter substances “or any number of innocuous substances” and is therefore
26 ambiguous. Put in context, however, the prosecutor’s question is part of an effort to
27 determine *when* Anderson first gave specific substances to Bonds, not what substances he
28 gave him. Thus, the question that forms the basis for Count Eleven was part of the

1 prosecutor's effort to determine the timing of Anderson's actions, and it is clear from the
2 context that Bonds understood these questions to have to do with when he received
3 specific substances from Anderson.

4 Bonds also argues that Bonds's reference to "discussions" in his answer shows that
5 he misunderstood the question. That contention ignores the colloquy that came directly
6 before Bonds's allegedly false statement. Initially, the prosecutor asked whether
7 Anderson "had ever given [Bonds] anything or asked [Bonds] to take anything before the
8 2003 season." Bonds apparently chose to answer only that part of the question relating to
9 whether Anderson asked him to take anything; he replied, "We never had those
10 discussions." The prosecutor then sought to clarify by telling Bonds, "That's not my
11 question, My question is...prior to the last season, you never took anything that he asked
12 you to take, other than vitamins?" Bonds's interrupted the question to say, "No," and
13 then unequivocally answered the question, "Right." In short, put in context, the
14 prosecutor's question contains no ambiguity, and Bonds's answer – "Right" – displays no
15 doubt as to its meaning. In any event, the question whether Bonds misunderstood the
16 question, and therefore did not give a knowingly false answer, is a question for the jury to
17 decide, not an issue to be resolved in a challenge to the sufficiency of the indictment.

18 6. Count Twelve

19 Count Twelve alleges that Bonds made a false statement in the following
20 exchange:

21 Q: Okay. So first of all, Mr. Bonds, I guess I want to recheck with you
22 or ask again exactly when you started getting the – what I'll call the
23 recovery items, what you understood to be flax seed oil and the cream,
24 when you started getting that from Greg Anderson. I think you said – but
25 please correct me if I'm wrong – that you thought it was prior to this current
26 baseball season.

27 But let me ask, I mean, is it possible it's actually a year before, after the
28 2000 – well, actually two years before, after the 2001 season? Because this first
29 calender is dated December 2001 with "BB" on it and it's got a number of entries
30 that I'd like to ask you about.

31 Were you getting items during that period of time from Greg?

32 A: No. Like I said, I don't recall having anything like this at during that time
33 of year. It was toward the end of 2000, after the World Series, you know, when

1 my father was going through cancer.

2 Indictment ¶ 33; GJTR at 96-97.

3 Bonds argues (Mot. at 11) that the question forming the basis for Count Twelve
4 “is, by any measure, unintelligible” and that “it is simply impossible to know what
5 falsehood Mr. Bonds is accused of telling at this juncture in his testimony.” Apparently,
6 however, he does not seek dismissal of this count and demands only to know the question
7 on which “the government will rest its case.” Mot. at 12.

8 In fact, the colloquy quoted in Count Twelve contains only one question, and it is
9 straightforward: was Bonds getting “flax seed oil and the cream” from Anderson in
10 December 2001. The prosecutor told Bonds what he was asking about – “flax seed oil
11 and the cream” – and, referencing the December 2001 calendar bearing the initials “BB,”
12 the prosecutor then asked Bonds whether he was getting those items from Anderson
13 during that time period. There is no ambiguity in that question.

14 As the transcript and the indictment make clear, Bonds added, “It was toward the
15 end of 2000, after the World Series, you know, when my father was going through
16 cancer.” The statement “toward the end of 2000” is not consistent with Bonds’s prior
17 testimony that Anderson first gave him flax seed oil and other substances in 2003;
18 Bonds’s reference to his father’s cancer, however, shows that he meant to refer to the
19 2003 season. *See* GJTR at 23-24 (Bonds’s testimony that his father died of cancer “at the
20 end of 2003, 2003 season”). In addition, by saying “after the World Series,” Bonds is
21 referring to the 2002 World Series in which he and the Giants played. Whatever the
22 effect of Bonds’s apparent mistake, the indictment alleges only that Bonds testified
23 falsely in denying that he received the substances “after the 2001 season,” not that he
24 falsely said that he received the substances from Anderson “toward the end of 2000.” At
25 trial, Bonds is free to argue that his apparent mistake in saying “toward the end of 2000”
26 shows that he did not understand the question and that his unequivocal denial that he
27 received the substances in 2001 is therefore not knowingly false, but Bonds’s
28 misstatement in his explanatory comment does not show that the question is ambiguous.

1 **7. Count Fourteen**

2 In Count Fourteen, the indictment alleges that the prosecutor asked, “And you
3 weren’t getting this flax seed oil stuff during that period of time [January 2002]?” Bonds
4 answered, “Not that I recall. Like I said, I could be wrong. But I’m – I’m – going from
5 my recollection it was, like, in the 2002 time and 2003 season.” Bonds argues (Mot. at
6 12-13) that by including the phrase “I could be wrong” in the statement alleged to be
7 false, the indictment alleged an “oxymoron.” In other words, Bonds appears to argue, his
8 statement that he could not recall getting flax seed oil in January 2002 cannot be false if
9 his statement “I could be wrong” is also false.

10 Bonds’s contention improperly seeks to dissect his answer and obscures its intent.
11 The prosecutor clearly asked Bonds if he was getting the flax seed oil in January 2002,
12 and Bonds answered that he could not recall getting it at that time and that he did recall
13 getting it “in the 2002 time and 2003 season.” To prove that this statement is false, the
14 government must show that Bonds got the flax seed oil in January 2002 and that he lied in
15 saying that he did not recall getting it then. The fact that Bonds interjected, “I could be
16 wrong” does not make his statement “Not that I recall” any less false. Indeed, if that were
17 true, a witness could always avoid a perjury charge simply by qualifying every false
18 statement with “I could be wrong.” In any event, Bonds’s argument misapprehends the
19 Court’s inquiry. A “fundamental ambiguity” challenge raises the question whether the
20 government’s question is ambiguous, not whether the witness’s answer is. If Bonds
21 wishes to argue that his assertion in Count Fourteen is not false because it is inherently
22 confusing, he is free to do so at trial. But whatever ambiguity resides in his answer is not
23 a ground for finding the question “fundamentally ambiguous” or dismissing Count
24 Fourteen.

25 **III. Count Fifteen is valid and should not be dismissed.**

26 Count Fifteen charges that Bonds obstructed justice during his grand jury
27 testimony by giving evasive, false, and misleading testimony, including the false
28 statements that are alleged in the other counts of the indictment. In his initial motion to

1 dismiss, Bonds argued only that Count Fifteen (Count Five in the original indictment)
2 was duplicitous. Bonds's current motion mentions that contention only in passing and
3 instead raises new challenges to Count Fifteen. First, he argues that Count Fifteen should
4 be dismissed because it rests in part on the false statements alleged in the other 14 counts
5 of the indictment. Because, Bonds asserts, "most of those charges are defective," Count
6 Fifteen must be dismissed as well. Second, Bonds claims that because Count Fifteen uses
7 the phrase "including but not limited to the false statements made by the defendant as
8 charged in Counts One through Fourteen of this indictment," it is "so vague as to deprive
9 the defendant of the due process notice required to prepare a defense." Third, Bonds
10 claims that Count Fifteen does not allege that the false statements on which it rests were
11 material. None of these contentions has merit.

12 Bonds's first argument – that Count Fifteen must be dismissed because of
13 ambiguities in other counts – misapprehends the theory behind Count Fifteen. That count
14 alleges that Bonds's grand jury testimony as a whole was so evasive and perjurious that it
15 constituted obstruction of justice. Accordingly, the essence of that count is Bonds's
16 repetition of false statements, coupled with his evasive testimony in response to other
17 questions posed by the prosecutor. In other words, this count rests on Bonds's grand jury
18 testimony as a whole, not on individual questions and answers. For that reason, this count
19 is not subject to dismissal even if Bonds's duplicity or ambiguity challenges result in the
20 dismissal of other counts.

21 Bonds's second argument also fails. Bonds does not claim that 18 U.S.C. § 1503,
22 the statute under which he is charged, fails to give him sufficient notice that his conduct
23 was criminal. *See United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) ("A conviction
24 fails to comport with due process if the statute under which it is obtained fails to provide
25 a person of ordinary intelligence fair notice of what is prohibited, or is so standardless
26 that it authorizes or encourages seriously discriminatory enforcement."). Instead, he
27 merely claims that Count Fifteen fails to include all of the conduct on which the
28 government will rely to prove that Bonds obstructed justice. That contention is without

1 merit, because Count Fifteen rests solely on Bonds's grand jury testimony and thus gives
2 Bonds adequate notice of the conduct that will be included in the government's proof at
3 trial. In addition, by referencing the other counts of the indictment, Count Fifteen directs
4 Bonds to 14 examples of testimony that contributed to his obstruction of justice.
5 Moreover, even if Bonds's grand jury transcript did not give him adequate notice, he is
6 not entitled to dismissal of the indictment. Instead, he should file an appropriate motion
7 for a bill of particulars. *See United States v. Long*, 706 F.2d 1044, 1054 (9th Cir.1983)
8 ("A motion for a bill of particulars is appropriate where a defendant requires clarification
9 in order to prepare a defense.... It is designed to apprise the defendant of the specific
10 charges being presented to minimize danger of surprise at trial, to aid in preparation and
11 to protect against double jeopardy.") (citations omitted).

12 Finally, Bonds argues (Mot. at 13-14) that Count Fifteen must be dismissed
13 because it fails to charge "that the purportedly false statements identified therein were
14 material." Section 1503 does not contain the word "material," however, and the case on
15 which Bonds relies, *United States v. Aguilar*, 515 U.S. 593 (1995), does not impose a
16 materiality requirement for that statute. Instead, that case merely explained that an
17 "endeavor" to obstruct justice "must have a relationship in time, causation, or logic with
18 the judicial proceedings" that the defendant tried to obstruct. *Id.* at 599. Nothing in
19 *Aguilar* says that when false statements form the basis for a violation of Section 1503,
20 they must be material.

21 Even if a Section 1503 allegation requires proof that false statements forming the
22 basis for an obstruction-of-justice allegation were material, Count Fifteen of the
23 indictment is sufficient. Count Fifteen charges a violation of Section 1503 in the
24 language of the statute, and that language implicitly or explicitly sets forth all of the
25 elements of the offense. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 127 S. Ct.
26 782, 788 (2007) (indictment that charges offense in the language of the statute, but failed
27 to expressly allege an element of the offense, was not defective).

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CONCLUSION

For the foregoing reasons, Bonds's Motion to Dismiss Counts I, II, V, VII, VIII, IX, XI, XII, XIV, and XV of the Superseding Indictment should be denied.

DATED: September 24, 2008

Respectfully submitted,

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