New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 23
TUESDAY, AUGUST 4, 2015

White-Collar Crime

Expert Analysis

Obstruction? Barry Bonds Prosecutors Strike Out in the Ninth

By **Robert J. Anello**

And **Richard F. Albert**

The Ninth Circuit's en banc reversal of baseball home run king Barry Bonds' 2011 obstruction of justice conviction[1] and the Justice Department's late July announcement that it would drop the case after a more than decade-long investigation and prosecution[2] have prompted some to call for a reassessment of Bonds' place in baseball history.[3] That controversy is bound to endure. For white-collar criminal practitioners, the Bonds case presents another example of how the breadth of the federal obstruction laws makes them a nearly irresistible choice for prosecutors, and of the seemingly endless struggle of the courts to define appropriate limits on their reach.

History suggests that Congress has found obstruction a difficult topic on which to legislate, though not for lack of trying. The primary federal obstruction statutes are notable for their unusual degree of complexity and overlap. In recent decades, often in response to highly publicized cases, Congress repeatedly has attempted to remedy various perceived "holes" in the coverage of these laws. These legislative efforts and prosecutors' tendency to push on the margins have created further vexing questions of statutory breadth, and have required the courts to impose limitations to cabin these laws within reasonable bounds. The Supreme Court's decision last year in the much-discussed "fish" case, *Yates v. United States*, is one example.[4] The Bonds decision is another prominent chapter in this saga, highlighting persistent questions regarding the reach of the "catchall" clause of a primary obstruction statute, Section 1503 of Title 18.

Overview of Statutes

The federal criminal code contains a plethora of statutes that cover various forms of obstruction of justice, broadly defined as the frustration of government purposes by violence, corruption, destruction of evidence, or deceit.[5] Among the most commonly used general obstruction statutes are Section 1503 (obstruction of federal judicial proceedings), Section 1505 (obstruction of congressional and administrative proceedings), Section 1512 (witness tampering), and Section 1519 (destruction or falsification of records in federal investigations).

The original general obstruction of justice statutes, sections 1503 and 1505, broadly provide for criminal sanctions against those who "corruptly" or by force or threat "endeavor" to obstruct the administration of justice. These statutes are expansive in scope, covering a wide variety of conduct, including acts that do not succeed but merely "endeavor" to obstruct justice. Nevertheless, one generally agreed upon limitation is that the obstructed proceedings actually must be pending.[6] In the highly publicized prosecution of former National Security Adviser John Poindexter for lying to Congress, an appellate court held that the term "corruptly" in Section 1505 was unconstitutionally vague.[7] That decision led Congress to amend the statute in 1996 to add a definition of "corruptly."

Section 1512, enacted as part of the Victim Witness Protection Act of 1982, bars witness tampering by force or threats, as well as a variety of other specified acts of obstruction, including "corruptly persuad[ing]" another person to withhold or alter evidence in an official proceeding, or preventing a witness from cooperating with authorities in regard to a federal offense. It covers judicial, congressional and executive proceedings, and in an effort to overcome a perceived shortcoming of Sections 1503 and 1505, expressly provides that the obstructed proceedings need not be pending or imminent.[8]

One consequence of the adoption of Section 1512 and its companion Section 1513, which bars witness retaliation, was to create judicial disagreement regarding whether witness tampering and retaliation remained within the purview of Section 1503; the U.S. Court of Appeals for the Second Circuit held that it did not.[9] Federal prosecutors relied on Section 1512 to prosecute Arthur Andersen for its role in the destruction of Enron-related documents in 2001. On appeal, the Supreme Court curtailed Congress' effort to eliminate the "pending proceeding" limitation, holding that the defendant must contemplate a particular official proceeding for the law to apply.[10]

The Andersen prosecution also confronted a quirk in the language of Section 1512; as written, the statute does not reach the conduct of the person who actually destroys documents, only the person who "corruptly persuades" another to do so. In response, as part of the Sarbanes-Oxley Act of 2002, Congress enacted Section 1519, which directly reaches the conduct of the individual shredder. Section 1519 prohibits knowingly altering, destroying, concealing, or falsifying any "record, document or tangible item" with intent to obstruct an investigation. Though it is another legislative broadening of obstruction, Section 1519's language suggests that it reaches only executive branch investigations. As referenced above, last year, the Supreme Court recognized a limit on Section 1519 in a case where the statute was used to prosecute a fisherman for destroying undersized fish caught in violation of federal regulations. The court held that Section 1519's prohibition on the destruction of "tangible objects" was limited to objects used to record or preserve information.[11]

ROBERT J. ANELLO *and* RICHARD F. ALBERT *are partners at Morvillo Abramowitz Grand Iason & Anello P.C.*. GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

Bonds Case

In 2003, Barry Bonds testified before a grand jury under a grant of immunity in the investigation of the Bay Area Laboratory Co-Operative (BALCO) for the distribution of steroids and other performance enhancing drugs in Major League Baseball. In response to the prosecutor's question whether Greg Anderson, an employee of BALCO and Bonds' trainer, ever gave Bonds anything that required a syringe with which to inject himself, the following exchange occurred:

> 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: Right.
>
> 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.[12]

After that answer, the prosecutor followed up by repeatedly asking whether Anderson ever gave Bonds substances that required injection, which Bonds directly answered in the negative.

The government ultimately charged Bonds with multiple counts of perjury for those subsequent denials. The government also charged Bonds with obstruction in violation of Section 1503, on the basis that the italicized portion of Bonds' statement, referred to as Statement C, was intentionally evasive and misleading.

To convict under the omnibus provision of Section 1503, the government must prove: 1) that there was a pending judicial proceeding; 2) that the defendant knew the proceeding was pending; 3) that the defendant then corruptly endeavored to influence, obstruct, or impede the due administration of justice. In addition, to limit the potential reach of the statute, in *United States v. Aguilar* the U.S. Supreme Court ruled that the act must "have a relationship in time, causation or logic" to judicial proceedings and "have the natural and probable effect" of interfering with those proceedings.[13] Some courts, including the Second Circuit, refer to the latter as a requirement of "nexus;"[14] the Ninth Circuit analyzes it as a question of "materiality."

At trial, the jury was unable to reach a verdict on the perjury counts, but convicted Bonds on the obstruction charge. A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit affirmed Bonds' conviction. The Ninth Circuit subsequently granted rehearing en banc. All but one of the Ninth Circuit judges who heard the case joined a two-paragraph per curiam opinion reversing the conviction. That opinion stated simply that Bonds' conviction and sentence must be vacated "[b]ecause there is insufficient evidence that Statement C was material." The four concurring opinions that followed reveal a number of different approaches to interpreting Section 1503.

The main concurrence, authored by Judge Alex Kozinski, framed the materiality analysis as whether "the charged conduct was capable of influencing a decision-making person or entity—for example, by causing it to cease its investigation, pursue different avenues of inquiry or reach a different outcome." Kozinski's test focused on the "intrinsic capabilities of the statement itself." He reasoned that Statement C was not material because in and of itself, it "communicates nothing of value or detriment to the investigation."[15]

In perhaps the key area of disagreement among the concurrences, Kozinski left open the possibility that a true but misleading answer to the question—for example, "I'm afraid of needles," which could infer an unspoken denial—might be obstructive. Kozinski explained that Statement C, however, was at most non-responsive. Absent evidence of a pattern of irrelevant statements clearly designed to waste time and preclude further examination, such a common example of the "road hazards of witness examination," standing alone, was incapable of influencing the grand jury. Kozinski observed this would be the case even if the irrelevant, non-responsive statement was literally false, given that the statement said nothing germane to the subject of the investigation.

The separate concurring opinions by Judges Smith and Reinhardt analyze materiality differently. Relying in part upon Supreme Court precedent construing the perjury statute, and focusing on the Aguilar decision's "natural and probable effect" test, Judge N. Randy Smith opined that evasive or misleading testimony can be obstructive only if it amounts to a "flat refusal to testify," and thus a single truthful but evasive statement can never be obstructive because the "natural and probable effect" of such a single statement is "not to impede the grand jury, but, rather, to prompt follow-up questioning."[16]

Judge Stephen Reinhardt's concurrence generally adopted Smith's analysis, but did not join his view that a flat refusal to testify may be prosecuted under Section 1503; instead it must be pursued under the law of contempt. Reinhardt explained his view that Section 1503 does not cover the testimony of witnesses in court proceedings. He examined the historical context of the predecessor statute of Section 1503, adopted in 1831, to draw a geographic divide between conduct that occurs in the presence of the court, which may constitute contempt, and conduct outside of court, which may constitute obstruction of justice. Reinhardt also opined that even if Section 1503 covered in-court conduct, the term "corruptly" requires more severe misconduct than simply giving a false or non-responsive answer.[17]

Judge William A. Fletcher, who concurred only in the judgment, asserted that the materiality standard, a "prudential" narrowing of the vast potential reach of Section 1503, is insufficient, and that the statute's history demonstrates that it is a narrowly targeted provision. According to Fletcher, courts have gotten off track by viewing the term "corruptly" as describing a state of mind, when it refers to a forbidden means, limited only to bribery.[18]

Although the various concurrences illustrate the court's belief that Section 1503 was applied too broadly against Bonds, the opinions differed in their view of the proper means to narrow the vast potential reach of the omnibus clause.

Conclusion

The Bonds case comfortably takes its place alongside the acquittal of Roger Clemens in illustrating jurors' misgivings about federal criminal prosecutions of ball players in connection with their claimed use of performance enhancing drugs. For practitioners, it also provides another case study in the federal criminal justice system's ongoing struggle to define the limits of obstruction of justice.

1. *United States v. Barry Bonds*, 784 F.3d 582 (9th Cir. 2015).
2. Rob Harms, "Justice Department Drops Case Against Barry Bonds," The New York Times (July 21, 2015).
3. Harvey Araton, "It's Time to Reconsider Barry Bonds for the Hall of Fame," On Baseball, The New York Times (July 25, 2015).
4. *Yates v. United States*, 135 S.Ct. 1074 (2014). See Robert J. Anello and Richard F. Albert, "Missing Fish, Obstruction Statute and Prosecutorial Discretion," NYLJ (Dec. 3, 2014).
5. See Charles Doyle, "Obstruction of Justice: an Overview of Some of the Federal Statutes that Prohibit Interference with Judicial, Executive, or Legislative Activities," Congressional Research Service Report (April 17, 2014) at 1.
6. See *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (Section 1503); *United States v. Quattrone*, 441 F.3d 153, 174 (2d Cir. 2006) (Section 1505).
7. *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991).
8. 18 U.S.C. §1512(f).
9. *United States v. Masterpol*, 940 F.2d 760, 762 (2d Cir. 1991).
10. *Arthur Andersen v. United States*, 544 U.S. 696, 707-8 (2005).
11. *Yates v. United States*, 135 S.Ct. 1074 (2014).
12. 784 F.3d at 583.
13. 515 U.S. at 599.
14. *United States v. Kumar*, 617 F.3d 612, 620-21 (2d Cir. 2010).
15. 784 F.3d at 585-86.
16. Id. at 589.
17. Id. at 592-93.
18. Id. at 595-96.