No. 11-10669

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Barry Lamar Bonds,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District Court No. 07-CR00732-SI

PETITION FOR REHEARING EN BANC

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STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

Pursuant to Federal Rule of Appellate Procedure 35(b), Barry Bonds hereby petitions for rehearing en banc of the panel decision in this matter. That published decision affirmed the defendant's conviction for obstruction of justice under 18 U.S.C. § 1503. *See United States v. Bonds*, - F.3d -, No. 11-10669 (9th Cir. Sept. 13, 2013) (Exhibit A). En banc review is necessary both to maintain uniformity of this Court's decisions and to resolve questions of exceptional importance.

INTRODUCTION

This is a case about prosecutors seeking a conviction of a high-profile defendant at any cost. The government charged Barry Bonds with lying to a grand jury that was investigating steroid use in professional sports. But the government's core case against Mr. Bonds crumbled because it could not prove that he lied. Years after it initially indicted Mr. Bonds, in order to salvage some victory from this long and expensive prosecution, the government invented a fallback theory of liability. That theory was that Mr. Bonds committed obstruction of justice when, rather than responding directly to a question he'd been asked by the prosecutor, he rambled on about being a "celebrity child." The "celebrity child" statement was not alleged anywhere in the indictment; indeed, the government itself had used ellipses to redact the rambling statement from the indictment. The government also conceded at trial that the statement was literally true.

The trial jury did not find Mr. Bonds guilty of lying. It found him guilty

solely on the fallback theory that the "celebrity child" statement, while truthful, was evasive. A three-judge panel of this Court affirmed.

In so doing, the panel refused to enforce all of the usual requirements that apply to perjury and false statement cases. Perjury cases are governed by long-established Supreme Court precedent, which holds that: (1) the false statement must be specifically identified in the indictment; (2) the statement must be literally false; (3) a statement that is merely evasive or implicitly misleading is insufficient; (4) if a witness initially fails to answer, the questioner must attempt to pin the witness down; and (5) the witness must be given an opportunity to cure initially false statements. The panel in this case held, for the first time, that none of those principles apply to obstruction prosecutions.

The law of this Circuit is divided on whether the obstruction statute covers perjury. Those cases adopting the "perjury-as-obstruction" theory were wrong, but they did little harm. Their main effect was to allow prosecutors to double-charge witness lies as both perjury and obstruction. (In fact, that is what prosecutors did in this case: they double-charged Mr. Bonds's allegedly false statements as both perjury under 18 U.S.C. § 1623 and obstruction under 18 U.S.C. § 1503.) But while it is one thing to say that perjury constitutes obstruction, it is quite another to say that non-perjury under oath constitutes obstruction.

The panel in this case became the first federal court to hold that non-perjury under oath constitutes obstruction. The panel's holding means that witnesses now have an affirmative duty to turn over all relevant information in their possession.

The panel's holding also means that any trial or grand jury witness can be subject to criminal prosecution if she is insufficiently cooperative, even for a moment. The scope of potential liability is vast.

After this ruling, obstruction will function as a way to obtain back-door convictions against witnesses viewed with disfavor by the government even when actual lies on their part cannot be proven. The limitations formerly applicable to perjury prosecutions will no longer have any meaning, since prosecutors can always charge the same witnesses with obstruction instead.

As one constitutional law professor and former federal prosecutor said of the panel opinion: "I'm surprised because the opinion in some sense doesn't do justice to the complexity of the arguments."[1] The arguments are indeed complex, and the implications are far-reaching. They merit more careful consideration by an en banc panel of this Court.

STATEMENT OF THE CASE

A. Background

The criminal charges in this case arose out of Mr. Bonds's testimony before a grand jury in 2003. The government had convened the grand jury to investigate Balco Laboratories, a Bay Area company suspected of distributing performance-enhancing drugs to professional athletes. Mr. Bonds was subpoenaed to testify before the Balco grand jury.

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[1] Howard Mintz, *Home Run King Barry Bonds Obstruction Conviction Upheld*, San Jose Mercury News (Sept. 13, 2013) (quoting Rory Little).

In his testimony, Mr. Bonds admitted that he had a relationship with Balco. He testified that he had obtained various substances, including those known as "the cream" and "the clear," from Balco through personal trainer Greg Anderson. Mr. Bonds testified that he believed the substances were legal. He denied that he had knowingly taken illegal performance-enhancing drugs provided by Balco.

B. Charges

In 2007, the government indicted Mr. Bonds for several counts of perjury and obstruction of justice arising out of his grand jury testimony.[2] The final superseding indictment consisted of five counts: four counts of false declarations to a grand jury in violation of 18 U.S.C. § 1623(a), and one count of obstruction of justice in violation of 18 U.S.C. § 1503. (ER 190-98.)

The four false declarations counts were based on Mr. Bonds's testimony: (1) that he never knowingly took steroids provided by Anderson, (2) that Anderson never injected him with anything, (3) that Anderson never gave him human growth hormone, and (4) that prior to the 2003 baseball season, Anderson never gave him anything other than vitamins. The government had eliminated Mr. Bonds's statement about being a celebrity child from the indictment and had replaced it with ellipses. The obstruction count, as alleged in the indictment, did not specify any particular statements other than the same four charged in the false declarations counts. The indictment stated that Mr. Bonds obstructed justice by giving

[2] Prior to trial, the government unsuccessfully pursued an interlocutory appeal to this Court based on the district court's exclusion of hearsay evidence. *See United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010).

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." (ER 198.)

C. Trial and Conviction on Statement C

Ultimately, the jury was unable to reach a unanimous verdict as to any of the false declarations charges. The jury did, however, reach a guilty verdict on the obstruction count. The jury's special verdict form indicated that its guilty verdict was based solely on "Statement C," also known as the "celebrity child" testimony. (ER 40.)

Statement C, submitted to the trial jury over the defense's objection (Dkt. 194; ER 45-49; ER 162-63), consists of the underlined portion of the following testimony by Mr. Bonds before the Balco grand jury:

> 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. Right.
>
> A. <u>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</u>. 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 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.

(ER 301-02.)

Less than a minute later, prosecutors again asked Mr. Bonds whether he had injected himself with anything, or whether Mr. Anderson had ever provided him with injectable steroids. Mr. Bonds answered in the negative. (ER 302.) The question was repeated, and he answered in the negative each time. (ER 303, 306, 308.) The prosecutor admitted that "we've covered this, but"—and again repeated the question. Mr. Bonds again answered that Mr. Anderson had never given him injectable substances. (ER 306.)

The prosecution argued to the trial jury that Mr. Bonds's testimony in Statement C was obstructive because, although literally truthful, it was evasive and failed to respond to the question that had been asked. The trial jury convicted Mr. Bonds of obstruction solely on this basis.

D. Appeal

Mr. Bonds appealed the obstruction conviction. He argued, *inter alia*, (1) that the obstruction statute, 18 U.S.C. § 1503, does not cover grand jury testimony at all; (2) that if false grand jury testimony is covered, the statute should not be further extended to cover truthful testimony; and (3) that the indictment was deficient because Statement C was not mentioned in, and indeed had been

redacted from, the charged testimony.

On September 13, 2013, a three-judge panel of this Court affirmed the conviction. The panel held that Mr. Bonds's argument against applying § 1503 was "foreclosed by established precedent." Slip op. at 15. It held that the statute covers any conduct "intended to deprive the factfinder of relevant information." Slip op. at 10. It thus concluded that § 1503 could be properly extended "to factually true statements that are evasive or misleading" such as Statement C. Slip op. at 11. The panel further held that, although Mr. Bonds "eventually" answered the same question directly, this was "irrelevant." Mr. Bonds was guilty at the moment he gave the non-responsive answer in Statement C. Slip op. at 13.

REASONS FOR GRANTING EN BANC REVIEW

I. THE PANEL'S BROAD CONSTRUCTION OF THE OBSTRUCTION STATUTE RENDERS MEANINGLESS ALL PRIOR LIMITATIONS ON CRIMINAL LIABILITY FOR WITNESSES

Trial and grand jury witnesses may be convicted of perjury or false statement crimes if they lie under oath. Some decisions of this Court have held that lies under oath also constitute obstruction of justice. But either path of conviction has been subject to several limitations—among them, a specific false statement must be charged in the indictment; the charged testimony must be proven literally false; and a witness may cure a false answer by correcting it. In this case, for the first time, the three-judge panel held that those requirements no longer apply to obstruction prosecutions. The ruling radically alters the legal principles governing criminal liability for witness misconduct.

A. The Panel's Opinion Ignores Unsettled Circuit Law

The panel's decision was based on a body of prior case law holding that the obstruction statute, 18 U.S.C. § 1503, also encompasses perjury. Mr. Bonds argued that even if that is true, the limitations of perjury must also apply to obstruction. But preliminarily, Mr. Bonds argues that, properly interpreted, § 1503 does not cover perjury because it does not cover witness testimony at all. The panel summarily dismissed this argument, stating that it is "foreclosed by established precedent."

To the contrary, the case law in this circuit is conflicting. Admittedly, several prior decisions of this Court have endorsed the "perjury-as-obstruction" theory. *See United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir. 1984); *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1984). But for decades prior to those rulings, this Court interpreted § 1503 narrowly, consistent with its intended scope. *See United States v. Metcalf*, 435 F.2d 754, 757 (9th Cir. 1970); *Haili v. United States*, 260 F.2d 744, 745-46 (9th Cir. 1958). In *Rasheed*, this Court suddenly reversed course and wrote off prior precedent as "dicta." 663 F.2d at 851-52. Two decades ago, an en banc panel recognized the conflict, and also the serious constitutional issues raised by the expansive interpretation of § 1503, but declined to settle the issue. *United States v. Aguilar*, 21 F.3d 1475, 1486 n.8 (9th Cir. 1994).[3]

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[3] The Supreme Court reversed in part on other grounds. *United States v. Aguilar*, 515 U.S. 593 (1995). The majority of the Court likewise declined to reach the broader question regarding the statute's scope. *Id*. at 600 & n.1.

Those prior cases holding that lies under oath constitute obstruction as well as perjury were wrongly decided. *First*, they are inconsistent with the text of §1503, which does not mention witness testimony at all. *Second*, they are inconsistent with § 1515(b), a related provision in which Congress stated that false statements constitute obstruction for other statutes but not § 1503. *Third*, by expansively interpreting the omnibus clause of § 1503, they are inconsistent with the *ejusdem generis* canon of statutory interpretation, which holds that catch-all clauses in criminal statutes must be construed narrowly to cover only acts similar to those already listed. *See Begay v. United States*, 553 U.S. 137, 143 (2008). *Fourth*, they are inconsistent with the legislative history. As Mr. Bonds detailed in his brief, every court and legal historian to examine § 1503 has concluded that the statute was not intended to cover false testimony.[4] *Fifth*, by giving § 1503 a "comprehensive" reading to facilitate prosecution, they are inconsistent with the rule of lenity. *See United States v. Santos*, 553 U.S. 507, 519 (2008) (Scalia, J.).

But until now, this debate was largely academic. *Rasheed* and *Gonzalez-Mares* held that § 1503 covers false statements under oath. The main effect of these holdings was to allow prosecutors to double-charge perjury cases under § 1503. *See, e.g., United States v. Thomas*, 612 F.3d 1107, 1125-27 (9th

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[4] *See, e.g., United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. Essex*, 407 F.2d 214, 217 (6th Cir. 1969); Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States—Since the Federal Contempt Statute*, 28 Colum. L. Rev. 525, 531 (1928); *see also Nye v. United States*, 313 U.S. 33, 45 (1941) (noting that the statute was enacted to *limit* obstruction prosecutions).

Cir. 2010). Because the standards were the same, and the penalties similar, it hardly mattered. If a jury found that a defendant was guilty of perjury, it would also find false-statement obstruction; if not guilty of one, not guilty of either. Until now, there was little reason for this Court to revisit the holdings in *Rasheed* and *Gonzalez-Mares* because those cases were wrong but meaningless. Until now, there was no reason to settle the intra-circuit split between those cases and the *Haili-Metcalf* line. The debate didn't matter, because its resolution didn't affect the outcome or sentence in any real cases.

That has all changed. After the panel's holding in this case, obstruction is not simply a way to double-charge perjury. Now, obstruction is a back-door way to punish disfavored witnesses without having to prove any actual perjury.

B. The Panel's Ruling Eliminates Requirements Ordinarily Applicable to Perjury and False Statement Cases

Some prior cases have held that perjury can be sufficient for obstruction. The panel in this case held, for the first time, that perjury is not necessary for obstruction. It held that truthful witness testimony under oath could constitute obstruction. It held that the mere intent to withhold relevant evidence is obstruction.

The panel decision suggests that all witnesses (and indeed all citizens) have an *affirmative duty* to turn over all relevant evidence, and that failure to do so constitutes a crime. The implications of this ruling are immense, and they deserve more careful consideration. The panel did not seem aware of the sweep of its ruling.

1. The Panel's Logic

Mr. Bonds argued that truthful statements cannot constitute obstruction. The panel disagreed. It first noted that the text of the obstruction statute "does not differentiate between" true statements and false statements made by witnesses. Slip op. at 10. But that assertion is true *only* because the statute does not refer to witness statements *at all*. The reasoning is circular and Orwellian in its consequences. Under the panel's logic, a penal statute can be read to criminalize both what it expressly proscribes and what it fails to even mention.

The panel further reasoned that truthful statements can be obstructive because the key to liability is not the nature of the conduct but rather the defendant's intent. The panel held that the statute criminalizes any "conduct intended to deprive the factfinder of relevant information." Slip op. at 10.[5] That is the critical move in the panel's argument—and it is a stunningly broad statement of criminal liability. The panel held that the gravamen of the offense is not a false statement or any actually obstructive conduct but rather the mere intent to deprive the factfinder of relevant information. By that logic, a witness who thinks to herself "I will not reveal this embarrassing episode unless asked on the stand" has committed a federal offense at the moment she has the forbidden thought.

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[5] For this proposition, the panel cited a Seventh Circuit case, *United States v. Ashqar*, 582 F.3d 819, 822-23 (2009). But *Ashqar* dealt with the proper wording of the jury instruction defining "corruptly." Nothing in *Ashqar* suggests that the bare intent to deprive a factfinder of relevant information constitutes a crime.

Compounding matters, the panel also held that the evidentiary burden needed to prove the forbidden intent beyond a reasonable doubt is not great. On the face of Mr. Bonds's testimony, it is hard to see how rambling about being a "celebrity child" demonstrates an intent to withhold evidence. According to the panel, the testimony was illegal and obstructive because "it implied that Bonds did not know whether Anderson distributed steroids and PEDs." Slip op. at 12. That is, to put it mildly, an aggressive interpretation of Mr. Bonds's intended meaning when he rambled about being a celebrity child. It is also a theory of liability that was never argued by the prosecutor or otherwise presented to the jury, nor can it be found in the government's appellate briefing.

Finally, the panel decision not only held that truthful statements can be obstructive; it held that this was an incurable offense. The panel held that it was "irrelevant that Bonds eventually provided a direct response" to the same question he purportedly evaded. Slip op. at 13. This is true because, according to the panel, a witness is immediately and irretrievably guilty the moment she posseses the forbidden intent to deprive the factfinder of relevant information. According to the panel, no subsequent conduct can cure a momentary lapse of cooperation. By this standard, because at some point nearly all witnesses give at least one unresponsive answer, nearly all witnesses will be guilty of obstruction.

Prior to this case, a witness who committed perjury also committed obstruction. After this case, a witness who is insufficiently cooperative, even for a moment, is guilty of obstruction. Rambling, stammering, and faltering under oath

is now a federal offense.

2. Obstruction, Perjury, and Bronston

Dubious logic aside, perhaps the biggest vice of the panel's ruling is that it obliterates all of the limitations that have always applied to perjury and false statement prosecutions. The seminal case dealing with a witness's criminal liability for conduct under oath is *United States v. Bronston*, 409 U.S. 352 (1973). Remarkably, the panel never cited *Bronston*, though the implications of *Bronston* were briefed by the parties. Nearly every aspect of the panel's ruling squarely conflicts with *Bronston*.

a. Literal truth

In *Bronston*, the Supreme Court held that literal truth is a defense to perjury charges. A charge may not be brought "simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth." *Id*. at 360. In this case, however, the panel held that truth is no defense. "We can easily think of examples of responses that are true but nevertheless obstructive." Slip op. at 10.

b. Unresponsive answers

In *Bronston*, the Supreme Court held that nonresponsive answers under oath do not constitute a crime. Although the Court accepted as "[b]eyond question" the government's claim that the defendant's answer was "not responsive," *id*. at 357, it held that such an answer is not criminal. The Court explained why: "Under the pressures and tensions of interrogation, it is not uncommon for the most earnest

witnesses to give answers that are not entirely responsive." *Id*. at 358. In this case, however, the panel held that non-responsive answers that can "be deemed evasive" are criminal. Slip op. at 10.

c. Implicitly false answers

In *Bronston*, the Supreme Court held that a witness cannot be held liable for answers that are merely *implicitly* misleading. The Court held that "the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true." *Id*. at 357-58. It held, in other words, that answers that are "unresponsive on their face but untrue only by 'negative implication'" are not criminal. *Id*. at 361. In this case, however, the court held that Mr. Bonds's testimony was criminal "because it implied that Bonds did not know whether Anderson distributed steroids and PEDs." Slip op. at 12.

d. Questioner's burden

In *Bronston*, the Supreme Court held that when a witness gives an answer that is initially nonresponsive, the "burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id*. at 360. It reasoned that in our system of adversary questioning, "the scope of disclosure is largely in the hands of counsel . . . ." *Id*. at 358 n.4. In this case, however, the panel held that the prosecutor's subsequent repetition of the key question, and Mr. Bonds's subsequent answers, were "irrelevant." It held that Mr. Bonds was guilty at the moment he gave an initial unresponsive answer. Slip op. at 13. Under the panel's

ruling, the burden is on the witness.

e. Broad construction

In *Bronston*, the Supreme Court rejected the government's argument that the "statute be construed broadly" in order to "fulfill its historic purpose of reinforcing our adversary factfinding process." *Id*. at 358. In this case, however, the panel accepted the government's argument that the statute should be given a "broad" and "comprehensive" interpretation in order to protect the "due administration of justice." Slip op. at 10, 14.

The panel's rationale conflicts with *Bronston* in every material respect. In the panel's defense, it is true as a formal matter that *Bronston* dealt with the perjury statute while this case involves the obstruction statute. But it is hard to see why the same principles should not apply in both contexts. Indeed, in the wake of this opinion, it is hard to see what function the perjury statute serves, since a federal prosecutor can always charge obstruction instead, thereby avoiding the limitations imposed by *Bronston*, and potentially obtaining a more stringent penalty to boot.[6] The panel's opinion renders the perjury statute meaningless, and it makes *Bronston* a dead letter. The obstruction statute now engulfs them both.

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[6] Although the recommended Guidelines sentences are generally the same, the statutory maximum for obstruction is double that for perjury. *See* 18 U.S.C. §§ 1503(b)(3), 1621-23. That fact has new salience in the wake of *United States v. Booker*, 543 U.S. 220 (2005).

II. THE PANEL'S HOLDING THAT A DEFENDANT CAN BE CONVICTED OF OBSTRUCTION BASED ON TESTIMONY NOT CHARGED IN THE INDICTMENT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, OTHER CIRCUITS, AND THE SUPREME COURT

Even if there were no other issue worthy of en banc consideration raised by the panel's opinion, such review would be required to address the panel's elimination of the requirements of pleading ordinarily applicable in perjury and false statement cases. It has always been the law that an indictment in a false statement case must specifically identify the statement alleged to be false. In this case, Statement C was intentionally redacted from the indictment. The panel found the pleading sufficient anyway.

During his appearance before the grand jury, Mr. Bonds was asked and answered over 500 questions. A dozen of those answers were specifically alleged in the four false statement counts contained in the indictment; those dozen exchanges were in turn incorporated by reference in the Count Five obstruction charge. The "celebrity child" question and answer were not alleged anywhere in the indictment. Indeed, the government intentionally excised the "celebrity child" statement from the false statements alleged in Count Two (and thus from the Count Five obstruction charge). The statement of conviction was replaced in Count Two by asterisks, clearly indicating that the excised language played no role in the grand jury's probable cause determination.

In general, a defendant has a constitutional right "to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361

U.S. 212, 217 (1960). "A person is entitled under the Fifth Amendment not to be held to answer for a felony except on the *basis of facts* which satisfied a grand jury that he should be charged." *United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9th Cir. 1997) (emphasis added). In the context of criminal charges against witnesses, this has always meant that an indictment must specify the specific piece of criminal testimony. In its seminal decision in *Russell v. United States*, 369 U.S. 749, 753 (1962), the Supreme Court dismissed an indictment where it failed to specify which piece of testimony constituted a crime. Since *Russell*, courts in all manner of perjury and false statements cases have ruled that the indictment must specify what statement was false. *See, e.g., United States v. Tonelli*, 577 F.2d 194, 200 (3d Cir. 1978) (perjury indictment dismissed because "the indictment in this case did not set forth the precise falsehoods alleged").

In this case, however, the panel ruled that the indictment was sufficient even though it failed to mention Statement C. The panel reasoned that, in alleging that the obstruction charge included but was "not limited to the false statements made by the defendant as charged in Counts One through Four," the indictment " put Bonds on notice" that he could be convicted based on any statement made during his grand jury testimony. Slip op. at 17-18. Under that logic, an indictment alleging that a defendant committed obstruction during testimony lasting over a week and ranging over many subjects would be constitutionally sufficient, although the defendant would be left to guess as to which of thousands of statements in his testimony needed to be defended as truthful. The panel cited no

case law to support its holding for good reason; all federal case law is directly to the contrary.

CONCLUSION

Unpleased with the performance of a witness, federal prosecutors no longer have to deal with the annoying legal requirements constraining perjury convictions found in *Bronston*, *Russell*, and other cases. Now, they can dispense with all of that simply by charging obstruction and citing *Bonds*.

The result in this case is a boon for federal prosecutors, who now have broad new power to punish witnesses whom they view as insufficiently cooperative. Whether the result sensibly interprets the federal criminal code, however, is another matter—and it is a matter that deserves en banc review.

Dated: October 28, 2013

Respectfully Submitted,

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CERTIFICATION REGARDING BRIEF FORM

I, Dennis P. Riordan, hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 4,641 words.

Dated: October 28, 2013

/s/ Dennis P. Riordan
Dennis P. Riordan

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