THE WEAKNESS OF THE BARRY BONDS OBSTRUCTION VERDICT

Yesterday the Barry Bonds trial ended with a single conviction for obstruction of justice and a mistrial declared due to a hung jury on the other three remaining counts. There were originally five counts in the indictment, but count four was dismissed prior to the case being given to the jury. The case was in front of Judge Susan Illston in the Northern District of California (NDCA) District Court.

Of the four counts given to the jury, the three mistried were for what is commonly referred to as perjury, but formally described as false declaration before a grand jury or court under 18 USC 1623(a). The jury votes on those three counts now dismissed via mistrial were 9-3 acquit (HGH use), 8-4 acquit (steroid use) and 11-1 convict (the injection count). As always, I strongly suggest that reading very much into such numbers on hung counts is foolish; the dynamics behind such numbers are never simple, and never what you think they are. Most media types covering the trial have, almost universally, stated they do not expect a retrial on the three hung counts. I think such a statement is premature, and somewhat ill advised, under the circumstances as the likelihood of a retrial will be dependent on what Judge Illston does with the coming motion to set aside the verdict and, assuming that is denied, the sentencing of Bonds.

The fascinating question right now, however, is exactly how firm is the obstruction conviction? The answer is maybe not so firm at all. When I first heard there was a partial verdict, I thought – as did several others around me – that it was likely a conviction and hung jury on the other counts. Well, that was exactly right, however I assumed the conviction would be on the injection count; never contemplated for a second

that the jury would not convict on any of the substantive predicate counts but still convict on the catch-all obstruction count. So, let's take a look at that count, and the conviction thereon, because there are some serious issues involved that tend to undermine its strength above and beyond the fact there were no convictions on the underlying counts.

The obstruction count is charged under 18 USC 1503, which reads:

> 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, or 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). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense

> charged in such case.

Now the astute reader will note there is no materiality requirement in the direct language of 18 USC 1503. However, a prior case in the 9th Circuit, *US v. Thomas*, has held that materiality of the obstructive conduct is indeed a necessary element for a conviction under 18 USC 1503.

> 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. Our conclusion does not, however, mandate a reversal of Thomas's obstruction conviction, because it is clear that the jury found the requisite element of materiality in convicting Thomas on count six. The jury unanimously returned a special verdict on Thomas's § 1503(a) charge indicating that the false statements alleged in counts one and three of Thomas's indictment obstructed justice, and the jury in turn had found Thomas guilty of making material false statements with respect to counts one and three. By convicting Thomas of perjury on counts one and three, the jury necessarily found the statements in those counts to be material. And by indicating in a special verdict form that these statements obstructed jus- tice, the jury necessarily found that Thomas's obstruction conviction was based on two material statements.

Several things are interesting here. First off, the *Thomas* decision was authored by the infamous torture memo author Jay Bybee. More importantly, however, *Thomas* was yet another in the long line of BALCO persecutions propagated by the rabid IRS investigator Jeffrey Novitsky. Lastly, the judge in the Bonds case, Susan Illston, knows the *Thomas* case well; she was judge on that case also. Illston has a wealth of experience in the

BALCO cases and, by my understanding, has no great love for the affair as a whole or the antics of lead investigator Novitsky.

Which brings us back to the Bonds obstruction conviction and materiality. In the aftermath of the verdict, I engaged in a Twitter discussion with Adam Bonin on the issue. My initial take was the conviction would hold up; but, after diving into this, and seeing the actual verdict form, I am far less convinced.

The jury instruction on the obstruction charge read as follows:

> OBSTRUCTION OF JUSTICE
>
> (18 U.S.C. § 1503)
>
> The defendant is charged in Count Five with obstruction of justice in violation of 18 U.S.C. § 1503. In order for the defendant to be found guilty of Count 5, the government must prove each of the following elements beyond a reasonable doubt:
>
> 1. The defendant corruptly, that is, for the purpose of obstructing justice,
>
> 2. obstructed, influenced, or impeded, or endeavored to obstruct, influence, or impede the grand jury proceeding in which defendant testified,
>
> 3. by knowingly giving material testimony that was intentionally evasive, false, or misleading.
>
> A statement was material if it had a natural tendency to influence, or was capable of influencing, the decision of the grand jury.
>
> The government alleges that the underlined portion of the following statements constitute material testimony that was intentionally evasive, false or misleading. In order for the defendant to be found guilty of Count 5, you must

all agree that one or more of the following statements was material and intentionally evasive, false or misleading, with all of you unanimously agreeing as to which statement or statements so qualify:

1. The Statement Contained in Count One

2. The Statement Contained in Count Two

3. The Statement Contained in Count Three

4. Statement A:

Q: Let me move on to a different topic. And I think you've testified to this. But I want to make

sure it's crystal clear. Every time you got the flax seed oil and the cream, did you get it in person

from Greg?

A: Yes.

Q: Is that fair?

A: Yes.

Q: And where would you typically get it? Where would you guys be when he would hand it to you generally?

A In front of my locker, sitting in my chair.

Q: Did he ever come to your home and give it to you?

A: Oh, no, no, no. It was always at the ballpark.

5. Statement B:

Q: …Do you remember how often he recommended to you about, approximately, that you take this cream, this lotion?

A: I can't recall. I don't – I wish I could. I just can't . . . I just know it

wasn't often. I just think it was more when I was exhausted or tired than like a regular regimen. You know, it was like if I was really sore or something, really tired…that's – that's – that's all I can remember about that.

Q: … would you say it was more or less often or about the same as the amount of times you took the liquid, the flax seed oil, the thing you understood to be flax seed oil?

A: I don't know. I never kept track of that stuff. I'm sorry. I didn't sit there and monitor that stuff.

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 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…

7. Statement D:

> Q: Did Greg ever give you testosterone in injectable form for you to take?
>
> A: No.
>
> Q: Would you have taken it if he gave it to you?
>
> A: He wouldn't jeopardize our friendship that way.
>
> Q: And why would that – you're very clear that that would jeopardize your friendship. Why would that jeopardize your friendship?
>
> A: Greg is a good guy. You know, this kid is a great kid. He has a child.
>
> Q: Mm-hmm.
>
> A: Greg is – Greg has nothing, man. You know what I mean? Guy lives in his car half the time, he lives with his girlfriend, rents a room so he can be with his kid, you know? His ex takes his kid away from him every single five minutes. He's not that type of person. This is the same guy that goes over to our friend's mom's house and massages her leg because she has cancer and she swells up every night for months. Spends time next to my dad rubbing his feet every night. Our friendship is a little bit different.

Out of all those bases for determining that Bonds obstructed justice, the jury picked one single base. They did NOT find any of the substantive bases applicable from any of the the substantive perjury counts in items 1-3. They did NOT find any of the more damning statements in Statements A, B or D applicable. No, the jury, as their sole basis for conviction of Bonds for obstruction, premised their finding on the weakest and lamest possible choice, in isolation, Statement C. Here is the official verdict form from the court evidencing just this fact, signed sealed and dated by the jury

foreman.

It is really hard to see, in isolation, how this meandering statement by Bonds is materially obstructive. First, the question at the GJ was whether Bonds' trainer, friend since childhood Greg Anderson, had given Bonds "anything that required a syringe to inject yourself with". Bonds gave a semi-responsive answer that the only person that ever touched him (presumably referring to injection) was his doctor, and then meandered off that such was not the nature of his friendship with Anderson. Was it mostly unresponsive rambling at that point? Sure. But calling that – isolated from any of the substantive perjury/false statement allegations, not to mention more germane statements – materially obstructive, in and of itself, of the whole steroid investigation seems weak. At best.

The statement is not particularly material to the investigation; it does not directly mislead, it simply meanders a little. There is no indication the questioning prosecutor attending to the grand jury particularly even cared enough to say the answer was unresponsive or follow up with a another and/or more specific question. There is not evidence it had any significant impact whatsoever.

Now, the fact is, Bonds' defense team moved for a directed verdict of acquittal based on insufficiency of the evidence at the close of the prosecution case, as is standard practice in the criminal defense community. As is standard in the court community, that motion was denied and the case allowed to go to the jury.

So, these exact arguments will now be made by Bonds' defense team, and indeed that indication has already been preliminarily given and such motion will be considered at a court date already set by Judge Illston for this and other issues on May 20th. The specific motion is a motion for directed verdict of acquittal despite the jury's finding, and is controlled by Rule 29(c) of the Federal Rules of Criminal Procedure (FRCrP). These motions are a staple of a good

criminal defense lawyer, but they are very rarely successful. As in almost never.

Does such a motion, which is made in the trial court *before* sentencing and any appeal therefrom, stand any chance in the case of Barry Lamar Bonds? Maybe. As stated previously, Judge Illston is not crazy about the prosecution and investigation antics in the BALCO cases in general, and for very good reason. And, remember, Illston has the experience directly on point with the *Thomas* case and 9th Circuit decision thereon. While Bybee and the 9th upheld the analogous *Thomas* verdict on obstruction, keep in mind that it specifically relied on the fact Thomas was also found guilty on the substantive perjury counts in her indictment. Barry Bonds was not, there is nothing substantive behind the so-called obstruction in Bonds.

So, we shall see on May 20th if the conviction of Barry Bonds actually holds up or not. My guess is there will be written briefing fleshing all this out between now and then. But, suffice it to say, this is a LOT closer call than the claimed “experts” on teevee are blathering about. Yes, Lester Munson of ESPN, I am talking about you; just shut up. In fairness to ESPN, their other legal analyst, Roger Cossack, I almost always find to be informed and sober in his assessments, and I do with his comments on the Bonds verdict as well.

Oh, and one last parting shot. Can someone, anyone, explain to me just how the hell Barry Bonds is prosecuted for false statements, but Lloyd Blankfein is not? Seriously, what kind of two faced double standard is going on over at the Department of Justice? Not to mention that Blankfein may be one of the few humans in the world that makes Barry Bonds look likable in comparison. Come on DOJ, honor your oath and prosecute the real criminals.