No. 06-____

IN THE
Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In reviewing convictions for perjury and obstruction of justice, both based solely on three allegedly false statements to a grand jury, did the Fifth Circuit err in refusing to give *de novo* or plenary consideration to petitioner's defense of literal truth, which this Court in *Bronston v. United States* treated as a threshold issue for the court, and instead affirming simply on the basis of deferential, sufficiency of the evidence review?

II. In reviewing the same two convictions, did the Fifth Circuit further err in refusing, contrary to the clear law of ten other circuits, to give *de novo* or plenary consideration to petitioner's defense that the prosecutor's questions which elicited the charged statements were excessively and fundamentally ambiguous, and instead affirming simply on the basis of deferential, sufficiency of the evidence review?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below are contained in the caption of the case.

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INTRODUCTION

In the emotionally charged environment following the collapse of Enron, a Houston jury convicted petitioner of perjury and obstruction of justice, both based solely on allegedly false answers to three grand jury questions. In reviewing these convictions, the Fifth Circuit declined to afford plenary review to petitioner's legal defenses of literal truth and fundamental ambiguity, and instead affirmed because it found the evidence sufficient "to support a reasonable juror's finding that his testimony was untruthful." Pet. App. 30a. Certiorari is warranted because the Fifth Circuit's refusal to recognize either of these defenses as presenting a question of law altered the outcome of this case, puts that circuit in conflict with virtually every other circuit court in the country on one or both issues, and is inconsistent with this Court's ruling in *Bronston v. United States*, 409 U.S. 352, 362 (1973), that "[p]recise questioning is imperative as a predicate for the offense of perjury."

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-47a) is reported at 459 F.3d 509. An order of that court denying rehearing and rehearing en banc (Pet. App. 1a) is unreported. The district court's order denying petitioner's motions for judgment of acquittal (Pet. App. 55a-59a) and the jury's verdict (Pet. App. 60a-63a) are also unreported.

JURISDICTION

The court of appeals entered judgment on August 1, 2006, and denied petitioner's petitions for rehearing and rehearing en banc on October 18, 2006. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case, 28 U.S.C. §§ 1623 and 1503, are reprinted at Pet. App. 76a-78a.

STATEMENT OF THE CASE

In July 2004, the Department of Justice's Enron Task Force indicted six individuals in its second major prosecution stemming from the sudden collapse of Enron Corporation in the

fall of 2001.[1] Like the Task Force's earlier prosecution of the Arthur Andersen accounting firm, *see Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), this case sought to place criminal blame upon third parties for frauds committed by Enron employees, by alleging that the third parties committed separate dishonest acts that facilitated or covered up the principal fraud. *See* Pet. App. 3a-8a.[2]

This petition challenges the only two convictions remaining out of an original fourteen secured against four non-employees of Enron in this second Task Force prosecution. Petitioner James A. Brown and three other employees of Merrill Lynch were each convicted of one count of conspiracy and two counts of wire fraud, but all of those convictions were reversed by a divided Fifth Circuit panel. Brown also was convicted of perjury and obstruction of justice, based on testimony he gave before the Enron Grand Jury. The panel affirmed those convictions on a 2-1 vote. Judge DeMoss dissented, urging Brown's acquittal.

The prosecution arose from a December 1999 transaction between Enron and Merrill Lynch, in which Merrill received, in exchange for cash and assumption of debt, shares in an Enron subsidiary whose principal assets were three power-generating barges located off the coast of Nigeria. Enron had been seeking to achieve quarterly earnings targets by selling a minority

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[1] At the time of the transaction at the heart of this case, Enron was one of the largest and most profitable companies in the United States. In the fall of 2001, however, reports began to surface that Enron executives had engaged in accounting and other improprieties. Within weeks, Enron announced a substantial charge against its prior earnings. On December 2, 2001, shortly after the SEC launched a formal investigation, Enron declared bankruptcy.

[2] Of the six individuals indicted in this case, two were employees of Enron and four, including petitioner, Daniel Bayly, Robert S. Furst, and William Fuhs, worked for Merrill Lynch. Of the two Enron employees, one, Sheila Kahanek, was acquitted, and the other, Daniel Boyle, was convicted on all counts and declined to appeal.

interest in the subsidiary. Tr. 2091-95. After pursuing several industry buyers, but concluding no such sale could be consummated by year end, Enron approached Merrill Lynch in December 1999. Pet. App. 3a-4a. Negotiations included several conference calls, and the drafting and execution of several agreements. Merrill and Enron consummated the share transaction on December 29, 1999. Gov. Ex. 216.[3] In recording the transaction as a sale of shares, Enron added $12,563,000 to its pre-tax earnings for the fourth quarter of 1999. Pet. App. 7a.[4]

The transaction was memorialized in several written agreements, including an Engagement Letter, Shareholders' Agreement, and Share Purchase Agreement. These documents create an unconditional sale of shares, with no commitment of any kind by Enron to buy the shares back or find a third-party buyer. Further, each agreement contains a standard merger clause, *see* Gov. Ex. 216, ¶ 6; Gov. Ex. 220, ¶ 17.8; Gov. Ex. 221, ¶ 10.1. The Share Purchase Agreement provides: "This Agreement and the schedules hereto contain the whole agreement between the Parties relating to the sale and purchase of the Shares, and supersede all previous agreements between the Parties relating to such sale and purchase." Gov. Ex. 221, ¶ 10.1. The Share Purchase Agreement also contains a disclaimer of reliance "on any representation, warranty, covenant, undertaking, indemnity, collateral contract or other assurance made or given by any other Party or any other person, whether in writing or otherwise, at any time before

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[3] As ultimately structured, Merrill purchased an equity interest for $7 million and assumed debt to Enron of $21 million. Pet. App. 4a; Gov. Ex. 216.

[4] Enron's reported profits for 1999 were $957 million, on revenues of $40.1 billion. Brian O'Reilly, *The Power Merchant [Enron #18]*, Fortune, Apr. 17, 2000, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2000/04/17/278071/index.htm (last visited Jan. 15, 2007).

signature of this Agreement, except as expressly set out herein." Gov. Ex. 221, ¶ 10.2.

Notwithstanding the clarity of the transaction as finally documented, the theory of the government's fraud and conspiracy case, as characterized by the court below, was "that the sale was a sham because Enron executives orally promised Merrill a flat fee" and guaranteed rate of return, and "allegedly promised that Enron or an affiliate would buyback Merrill's interest in the barges if no third party could be found." Pet. App. 2a. This "rendered Merrill's interest in the barges risk-free," and "Enron's accounting of the deal as a sale rather than a lease was false." *Id.* Thus, the government contended, by entering into the transaction while aware of the oral buyback promise, the Merrill Lynch defendants were knowing participants in a conspiracy and scheme to defraud Enron and its shareholders. *Id.*

The charges of perjury and obstruction against petitioner also depended on the government's assertion of an oral buy-back promise. The perjury count alleged that Brown "testified falsely as to a material matter by stating, among other things, that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction." Pet. App. 26a n.14 (internal quotation marks omitted). That count quoted three responses made by Brown to the grand jury that were alleged to be false.[5] The obstruction count reasserted these

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[5] The Third Superseding Indictment quotes the following allegedly perjured testimony (underlining in original indicates statements alleged to be false):

> Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30?
>
> A: <u>It's inconsistent with my understanding of what the transaction was.</u>
>
> . . .

allegations, incorporating by reference the same three allegedly false statements charged as perjury. *See* Indictment ¶ 38. It further alleged that the statements were "false and misleading" (*id.* ¶ 39) for the same reason—that they denied knowledge of any oral promise relating to the barge transaction, *id.* ¶ 38. The obstruction count contained no allegations of any other acts of obstruction. *See id.* ¶¶ 38-40.

During the six-week trial, the evidence showed that after Enron approached Merrill in late December about buying the barge interest, there were discussions within Merrill ranging from interest in "fostering an on-going relationship with Enron" by pursuing the deal, to various concerns expressed by petitioner and others based in part on Merrill's desire not to hold the shares on any long-term basis. *See* Pet. App. 4a-5a. In particular, petitioner at this early stage noted his concerns to others: "'Enron credit/performance risk,' a lack of 'repurchase oblig. from Enron,' and the 'reputation risk' of 'aid[ing] and abet[ting] Enron income stmt. manipulation.'" Pet. App. 4a. In Merrill's internal discussions, it was made known that any repurchase commitment by Enron would be inconsistent with the entire purpose of the transaction, because the deal would no

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(continued…)

> Q: . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?
>
> A: In – no, I don't – the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.
>
> Q: So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by a sale to another investor by June of 2000?
>
> A: No.

Pet. App. 28a-29a & n.15, 65a-69a.

longer constitute a sale and thus "Merrill would have to own the barges outright without any buyback agreement." Pet. App. 5a.

Merrill made clear to Enron its desire not to own the shares for more than six months, Pet. App. 4a-5a, and it received assurances from Enron before the sale closed that Enron would assist—and was optimistic it could succeed—in remarketing the shares within that time at a price that would produce Merrill's desired return. *Id.* Belatedly aware that such assurances left the risk of ownership with Merrill and thus required Enron's accounting treatment of the transaction as a sale, the government ultimately rested its case on the assertion of a distinct and categorical oral assurance by Enron. Specifically, the government claimed that in a telephone conversation at 9:30 a.m. on December 23, 1999, Enron's CFO, Andrew Fastow, orally assured several Merrill employees that Merrill would not own the barges for longer than six months and that if Enron could not locate a third party buyer, it would itself buy back the shares within six months. Pet. App. 6a.

It is undisputed that petitioner was not on the allegedly critical Fastow phone call, Pet. App. 6a, and no one who was on the call testified about what was said.[6] And, while some draft

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[6] Neither Fastow nor any other participant in the December 23 conference call testified on behalf of the government at trial. The testimony of Eric Boyt, cited by the court below, Pet. App. 6a, was based upon his after-the-fact conversation with defendant Boyle, who was on the call. Tr. 2525-26. Further, the government succeeded in keeping out of evidence critical *Brady* material: a government summary of an FBI 302 report of an interview of Fastow, in which Fastow stated that he never guaranteed that Enron would repurchase Merrill Lynch's interest in the transaction, and was not sure if he used the word promise. Fastow said that he assured Merrill Lynch that it "could have a high level of confidence that an entity was interested in the barges and that entity, LJM2, would buy the barges after six months." Dkt. 241, Ex. B (RE:13). The FBI 302 summary further states that "Fastow did not say that Enron would buy back the barges, but represented instead that a third party would." Dkt. 241, Ex. B (RE:13). One reason Fastow could speak with such confidence about LJM2's intention to purchase the shares after six

deal documents included references to a promise by Enron to buy back the shares, as finally executed, all documentation, including the final Engagement Letter which went out over Brown's name, embodied only an outright sale of shares, and imposed no duties whatsoever on Enron to either buy back or remarket Merrill's interest in the barges. Pet. App. 6a.

On June 29, 2000, Enron arranged for the sale of Merrill's shares to LJM2, an entity that was controlled by Fastow but independent from Enron. Pet. App. 7a-8a.

More than two years later, on September 25, 2002, petitioner, voluntarily and without prior subpoena, testified before the Enron Grand Jury in Houston. He claimed no privilege and responded fully to all questions asked. Petitioner testified consistently that (i) Merrill Lynch had made it clear that it did not want to own the barges after June 30, 2000, Pet. App. 67a; (ii) Merrill Lynch had received "strong comfort" that Enron would use its best efforts to get Merrill Lynch out of the deal within six months by a sale to a third party, Pet. App. 70a; and (iii) it was his understanding that the terms of the transaction did not obligate Enron to repurchase the shares, Pet. App. 65a-67a; *see also* Pet. App. 26a n.15. Brown explained his understanding of Enron's "assurance" to Merrill Lynch in these terms:

> I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would get that comfort. If assurance is synonymous with guarantee, that is not my understanding. If assurance is interpreted to be more along the lines of strong comfort or use of best efforts, that is my understanding.

Pet. App. 27a n.15, 70a.

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months was that Fastow served as LJM2's general partner. *See* Tr. 1284, 1522-24.

Proceedings Below

In September 2004, the case went to trial in the United States District Court in Houston, Texas. At the close of the government's case, petitioner Brown moved unsuccessfully to dismiss the perjury and obstruction counts, citing *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), and *United States v. Serafini*, 167 F.3d 812 (3d Cir. 1999). *See* Brown Mot. for Acquittal at 11-14; Pet. App. 57a. On November 3, 2004, the jury returned verdicts of guilty on all charges against the Merrill Lynch defendants. Pet. App. 60a-63a.

The four Merrill employees appealed their conspiracy and wire fraud convictions. Petitioner also appealed his perjury and obstruction of justice convictions on a number of grounds, including that his answers were literally true, and that in any event the questions were so fundamentally ambiguous that, as a matter of law, they cannot support a conviction for perjury. Brown averred that these are questions of law requiring *de novo* review. *See* Brown Br. 60-61; Brown Reply Br. 41 n.42.

First, the Fifth Circuit panel, by a vote of 2-1, vacated all twelve convictions on the conspiracy and wire fraud counts, *see* Pet. App. 9a-21a, concluding that the deprivation of honest services theory of fraud, on which the government relied, was legally inapplicable to the facts of this case. Pet. App. 18a-19a. Even though these twelve counts rested simultaneously on two other alleged fraud theories (challenges to which the court did not consider), because the jury was not asked to indicate the basis for its verdict, the legal insufficiency of one theory required reversal. Pet. App. 12a, 21a (citing *Yates v. United States*, 354 U.S. 298 (1957)). Having reversed on that ground, the court declined to address any of the other arguments raised in support of a new trial, including the claim of all defendants that the trial court critically erred in excluding from evidence the government's summary of an interview of Fastow in which he denied making any unconditional oral promise. Pet. App. 9a-10a.

Next, the court unanimously reversed the trial court's failure to grant the motion of Merrill Lynch defendant William Fuhs for a judgment of acquittal at the close of the government's case. Pet. App. 21a-25a. The court upheld the district court's denial of the acquittal motions of the other defendants. Pet. App. 25a.

Finally, by a different 2-1 majority, the panel affirmed petitioner's convictions of perjury and obstruction of justice. Pet. App. 25a-36a. It categorically rejected petitioner's contention that his literal truth and fundamental ambiguity challenges are entitled to *de novo* review, finding instead that they raise only challenges to the sufficiency of the evidence, requiring deferential review of the jury's verdict. Pet. App. 29a & n.16. Applying that standard, the court upheld the convictions as based on sufficient evidence "to support a reasonable juror's finding that his testimony was untruthful." Pet. App. 30a. The court justified its conclusion on four evidentiary grounds.

First, the court noted that Brown was advised at the outset of the discussions within Merrill that Enron had requested an end-of-the-year purchase by Merrill of "$7 [million] of equity in a special purpose vehicle that would allow Enron to book $10 [million] of earnings," and that Enron "view[ed] this transaction as a bridge to permanent equity and they believe [Merrill's] hold will be for less than six months." Pet. App. 30a (internal quotation marks omitted).

Second, the court noted Brown's participation in an internal Merrill conference call on December 22, 1999, just after Merrill was first approached and seven days before the deal closed, during which reference was made to Enron's assurances "that it would help find a third party buyer," and that, if one was not found by June 30, 2000, "Enron would repurchase the barges from Merrill." Pet. App. 30a. On the same call, the court also noted, the point was made that no such written assurance could be provided, "because such an assurance would prevent Enron

from receiving the accounting treatment it was seeking from the deal." *Id.*[7]

Third, the court relied on the evolution of the Engagement Letter, from a draft that referenced a buyback guarantee by Enron to a final agreement that omitted any reference whatsoever to the resale of Merrill's shares. Pet. App. 30a.

Finally, while noting unequivocally that Brown "was not a party to the Fastow call," Pet. App. 6a, 31a n.17, the court cited, as evidence of Brown's awareness of an unconditional oral buyback promise by Fastow, an e-mail sent by Brown more than fourteen months later—in March 2001. That e-mail was sent to encourage a decision by Merrill to proceed with an entirely separate deal: "I would support an unsecured deal provided we had total verbal assurances from [the company's C.E.O. or C.F.O.]." Pet. App. 6a (brackets in original). In the e-mail, Brown supported that approach by reference to the Enron barge deal: "[W]e had Fastow get on the phone with Bayly and lawyers and promise to pay us back *no matter what.*" Pet. App. 31a (emphasis added by the court). The court concluded that "a reasonable jury could consider such an admission reliable and reject Brown's proffered explanation that the e-mail was an exaggeration of 'the strength of the promise [made by Fastow].'" Pet. App. 31a n.17.

The court rejected petitioner's fundamental ambiguity argument in a single paragraph, noting that there was "no indication that Brown struggled to understand or actually misunderstood the meaning of the questions." Pet. App. 32a.

Judge DeMoss dissented from that portion of the majority opinion affirming Brown's perjury and obstruction of justice convictions. Pet. App. 43a-47a. Judge DeMoss characterized the evidence of events in December 1999 as "business negotiations preceding a deal ultimately reduced to a written

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[7] The court did not here note the similar comment the same day by Merrill lawyer Katherine Zrike that "Merrill would have to own the barges outright without any buyback agreement." Pet. App. 5a.

agreement," Pet. App. 43a, noting that while "[e]mployees of Enron and Merrill may well have considered a buy-back agreement, promise or guarantee during the negotiations . . . [t]he conversations preceding the deal are only negotiations, and the ultimate written agreement speaks for itself." Pet. App. 44a. Because the final deal documents contained merger and integration clauses, and made no mention of any buy-back guarantee, Judge DeMoss concluded that "Merrill's $7 million was absolutely at risk. Any oral assurances of a take-out offered to Merrill by any Enron employee would not have been legally binding on Enron." Pet. App. 45a.

Judge DeMoss also considered the March 2001 email, which he quoted in its entirety.[8] The text of the email, he reasoned, showed that "Brown was attempting to use the success of the earlier deal to persuade a colleague" to proceed with a deal then under consideration. Pet. App. 46a. The Engagement Letter and other documents show conclusively that "[n]o legally enforceable promise was ever made to take Merrill out of the Enron deal," and "no reasonable jury could construe the e-mail as anything but an overly simplified, shorthand description of the barge investment." *Id.*

REASONS FOR GRANTING THE PETITION

Petitioner testified before the federal grand jury investigating the sudden collapse of Enron Corporation in 2001 about a December 1999 transaction which all legal documentation showed to be an unconditional sale by Enron to Merrill Lynch of a minority interest in Nigerian power barges. In response to

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[8] The email stated:

> If it[']s as grim as it sounds, I would support an unsecured deal provided we had total verbal [a]ssurance from CAL ceo or Cfo, and [S]hulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well. What do you think?

Pet. App. 45a-46a (brackets in original).

questions framed by a series of exhibits he had never seen, petitioner testified that, while Enron had promised to use its best efforts to find a buyer, any "obligat[ion]" by Enron to relieve Merrill of the barges was "inconsistent with [his] understanding of . . . the transaction." He further testified that—contrary to a June 2000 document that, under the heading "Description of the Transaction," summarized the transaction as including a "promise" to "get [Merrill] out of the deal"—he was not aware of any such promise. The prosecutor never specifically asked about an oral promise, or any promise separate from the binding terms of the integrated, written agreements.

Petitioner was indicted by the grand jury and ultimately convicted on charges of perjury and obstruction of justice. Both charges were based solely on the same three responses, which the indictment alleged were false and misleading in stating that Brown "did not know of any oral agreement between Enron and Merrill Lynch relating to the barge transaction." Indictment ¶ 18. Petitioner objected at trial to the submission of these charges to the jury, *see* Brown Mot. for Acquittal at 11-14, and, on appeal, argued that they must be dismissed on the grounds of the literal truth of his answers and the fundamental ambiguity of the prosecutor's questions, *see* Brown Br. at 58-79.

This Court emphasized in *Bronston v. United States*, 409 U.S. 352, 362 (1973), that "[p]recise questioning is imperative as a predicate for the offense of perjury."[9] In

[9] In *Bronston*, the defendant had responded to the question whether he had ever had a Swiss bank account by noting that his company had once had one. The government later proved that the defendant once had a personal account and that he had intended, by his non-responsive answer, to falsely imply otherwise. 409 U.S. at 354. Unanimously overturning the perjury conviction, this Court rejected the government's urging that "the perjury statute be construed broadly," *id.* at 358, and held that a witness may not be convicted of perjury for an answer "that is literally true but not responsive to the question asked and arguably misleading by negative implication." *Id.* at 352-53; *see also id.* at 361-62. The Court

accordance with this admonition, the federal courts have generally recognized that special scrutiny must be applied to allegations of false sworn statements, like those against petitioner, that depend upon the resolution of disputes over the meaning of specific testimony. In particular, the courts have recognized two distinct but closely related doctrines that foreclose prosecution, as a matter of law and based on *de novo* review by the court, of statements that either (i) are literally true under the court's independent interpretation of the testimony, or (ii) are made in response to questions that are too vague and ambiguous to allow a jury to conduct a reasoned inquiry about the defendant's intended meaning.[10]

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could "perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer." *Id.* at 359.

Noting the "pressures and tensions of interrogation," which can sometimes explain a failure to give a fully responsive answer, *id.* at 358, and recognizing a historic concern that perjury laws not be applied in such a manner "as to discourage witnesses from appearing or testifying," *id.* at 359 (internal quotation marks omitted), the Court emphasized that the perjury statute must be read to place the "burden . . . on the questioner to pin the witness down to the specific object to the questioner's inquiry" and that "[p]recise questioning is imperative as a predicate for the offense of perjury." *Id.* at 360, 362.

[10] *Bronston* involved the generic federal perjury statute, 18 U.S.C. § 1621, whereas the perjury charge here arises under 18 U.S.C. § 1623, "False declarations before grand jury or court." The lower courts have routinely extended *Bronston* and the companion doctrines of literal truth and fundamental ambiguity to prosecutions under § 1623, *see, e.g.*, *United States v. Richardson*, 421 F.3d 17, 32 n.16 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2319 (2006); *United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998), and 18 U.S.C. § 1001, the false statements statute, *see United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003) (collecting

Contrary to the decisions of other courts of appeals, however, the court below—adopting a position unique among the circuit courts—refused to recognize either of these defenses as raising a legal issue requiring any independent determination by the court. Instead it ruled that these defenses required only that the evidence be sufficient "to support a reasonable juror's finding that his testimony was untruthful." Pet App. 29a & n.16. In doing so, the Fifth Circuit placed itself on the pro-prosecution side of two substantial and sharp splits in the Circuits, and denied petitioner any proper consideration of two legal defenses.[11]

(continued…)

cases). *But see United States v. Harrod*, 981 F.2d 1171, 1175-76 (10th Cir. 1992) (holding that *Bronston* does not apply to § 1001). This extension of *Bronston* comports with this Court's view that the federal perjury and false statements statutes are "analogous." *See Brogan v. United States*, 522 U.S. 398, 402 (1998).

[11] On the facts of this case, the failure of the perjury charge necessarily results in the failure of the obstruction charge. The same three allegedly "false and misleading" statements to the grand jury formed the basis of both counts, *see* Indictment ¶¶ 36-40, and no additional conduct was alleged in support of the obstruction charge. *See In re Michael*, 326 U.S. 224, 227-28 (1945) (holding that to support a determination of criminal contempt predicated on false testimony, the government must prove, *inter alia*, the "essential elements of perjury"). Otherwise charges of obstruction would offer a ready avenue to circumvent *Bronston*'s construction of the perjury statute, which avenue would be available whenever a witness testifies before a grand jury in the context of an investigation. *See United States v. Aguilar*, 515 U.S. 593, 600-01 (1995).

I. THERE IS A SUBSTANTIAL SPLIT IN THE CIRCUITS ON WHETHER THE LEGAL DEFENSE OF LITERAL TRUTH ESTABLISHED IN *BRONSTON* APPLIES TO RESPONSIVE ANSWERS

On the facts before it, this Court in *Bronston* foreclosed any prosecution under the perjury statute of testimonial statements which are literally true, even where they in fact convey—and are intended to convey—a false and misleading meaning. 409 U.S. at 359. Indeed, the Court's holding amounted to a construction of the statute as not reaching such statements, even assuming that the defendant by his evasive words sought to and succeeded in misleading his questioner. *Id*. at 358-59. *Bronston* has thus been construed by the lower courts as creating a defense to perjury allegations, based on the literal truth of the challenged statement, which stands even in the face of undisputed or overwhelming proof that the defendant chose his words carefully to convey a false and misleading message. Lower courts have generally treated this defense as raising a legal issue requiring independent determination by the court, apart from any assessment of the sufficiency of the evidence.

For example, in *United States v. Shotts*, 145 F.3d 1289, 1299 (11th Cir. 1998), the Eleventh Circuit, employing *de novo* review, *id.* at 1297, reversed a perjury conviction based on the defendant's negative response to the question, "Do you own a bail bonds business?" The government persuaded the jury that the defendant's answer was knowingly false, because all the stock in the company was held in his wife's name, *id.* at 1291, and he had represented himself and functioned as the owner. *Id.* at 1298. In reversing, the Eleventh Circuit explained that a corporation is owned by its shareholders, so that the defendant's "answer to the question whether he 'owned' the company was literally true as a matter of . . . law." *Id.* "*Bronston* expressly places on the questioner the burden of pinning the witness down to the specific object of the inquiry." *Id.* Thus, "[e]ven if [the defendant's] answer was evasive, nonresponsive, intentionally misleading and arguably false, it

was literally true and cannot support a conviction under Section 1623." *Id.* at 1299.

Similarly, in *United States v. Earp*, 812 F.2d 917 (4th Cir. 1987), the Fourth Circuit conducted an independent review of the testimony and reversed a perjury conviction of a Klan member who denied before the grand jury that he had ever burned a cross at anyone's house. The defendant was asked: "How do you feel about burning crosses at the residences of interracial couples?" He answered: "I don't believe in it." He was then asked: "Have you ever done it, sir?" He answered: "No, I haven't." *Id.* at 918 (emphasis omitted). The evidence showed that the defendant had participated in an unsuccessful attempt to burn a cross in the front yard of an interracial couple. *Id.* The government alleged, and the jury agreed, that the second answer was therefore false because "[the defendant] had 'personally participated in the cross burning at the residence of [an interracial couple].'" *Id.*[12] The Fourth Circuit reversed the conviction, concluding that the defendant's answers were literally truthful because, "while he no doubt knew full well that he had on that occasion tried to burn a cross, he was not specifically asked[] about any attempted cross burnings." *Id.* at 919.[13]

Numerous other cases in the appellate courts have addressed the defense of literal truth in a similar manner—as a legal defense implementing the statutory purpose to demand precise questioning, which is decided by the court in the first instance, and not on deferential review focusing on whether any reasonable jury could find the defendant guilty. *See, e.g.*,

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[12] In addition, the government offered testimony of an FBI agent who testified that the defendant told him that he had lied to the grand jury. *Id.* at 918-19.

[13] The Fourth Circuit also applied *Bronston* to responsive answers in *United States v. Hairston*, 46 F.3d 361 (4th Cir. 1995), in which it cited *Earp* and held that a "perjury conviction cannot be based upon evasive answers or even upon misleading answers so long as they are literally true." *Id.* at 375.

United States v. Laikin, 583 F.2d 968, 970-71 (7th Cir. 1978) (applying *Bronston* to a responsive answer and reversing a conviction based on an independent review of a literal truth claim); *United States v. Vesaas*, 586 F.2d 101, 103-04 (8th Cir. 1978) (reversing a conviction based on an independent review of a literal truth claim); *United States v. Good*, 326 F.2d 589, 591-92 (4th Cir. 2003) (applying *de novo* review and affirming dismissal of perjury indictment because statements were literally true); *United States v. Baer*, 92 F. App'x 942, 944-46 (4th Cir. 2004) (same).

In recent years, a substantial conflict has developed in the circuits as to whether this legal defense of literal truth applies outside the specific context of the *Bronston* decision, in which a non-responsive answer to a prosecutor's question created a misleading implication. While several circuits, including the Fourth and the Eleventh, continue to regard *Bronston* as applicable to all claims of literal truth, *see supra* pp. 15-16, others including the First, Second, Fifth, Sixth, Eighth, and Ninth Circuits, have concluded that *Bronston*'s holding should be confined to its specific facts. These courts accept *Bronston*'s literal truth defense as a legal bar to a perjury prosecution in the instance of non-responsive but misleading answers, but hold that where an answer is responsive, a claim of literal truth is merely a challenge to the sufficiency of the evidence. Only when no reasonable juror could have found that the defendant's answer was false will a perjury conviction based on a responsive answer be reversed on a claim of literal truth.

In *United States v. DeZarn*, 157 F.3d 1042 (6th Cir. 1998), for example, the Sixth Circuit expressly ruled that *Bronston* was not applicable in the context of responsive answers. *Id.* at 1051. It thus affirmed a perjury conviction based on the defendant's responses to the prosecutor's questions, which misidentified an event as having occurred in 1991. *Id.* Although the answers were literally true, because the actual event occurred in 1990, the court upheld the conviction on the ground that the jury was permitted to look at the context of the

questions and answers to determine whether the witness knew the true intent of the questions. *Id.* The court reasoned that "when the questions and answers proceed on a false premise of which the defendant is aware, he may not evade the true intent of the line of questioning by stacking literally true answers on top of the false premise." *Id.* The court also explained that "a perjury inquiry which focuses only upon the precision of the question and ignores what the Defendant knew about the subject matter of the question at the time it was asked, misses the very point of perjury: that is, the Defendant's intent to testify falsely and, thereby, mislead his interrogators." *Id.* at 1049.

In *United States v. Robbins*, 997 F.2d 390 (8th Cir. 1993), the Eighth Circuit likewise upheld a perjury conviction where the prosecutor misstated the name of the company about which he was inquiring, which made technically correct the defendant's denial that it possessed any assets (since the referenced company did not even exist). *Id.* at 394-95. The court distinguished *Bronston* by reasoning that "no unresponsive answers which could mislead the questioner are involved so we are not faced with [that] unique problem." *Id.* at 395. The court instead held that absent fundamental ambiguity, the truthfulness of defendant's answer is for the jury. *Id.* Applying a deferential review, it upheld the conviction, reasoning that "[t]he jury did not accept" the defendant's argument that the misstatement of the company name defeated the government's claim of knowing falsity, and there was "sufficient evidence to sustain the guilty jury verdict." *Id.*

A number of other courts have taken the same view, distinguishing *Bronston* on the same ground. *See, e.g.*, *United States v. Richardson*, 421 F.3d 17, 33 (1st Cir. 2005) (*Bronston* applies only where statement was "not responsive to the question asked" (internal quotation marks omitted)), *cert. denied*, 126 S. Ct. 2319 (2006); *United States v. Shafrick*, 871 F.2d 300, 303-04 (2d Cir. 1989) (*Bronston* inapplicable "[b]ecause the answer was responsive"); *United States v.*

Camper, 384 F.3d 1073, 1076 (9th Cir. 2004) (*Bronston* "limited to cases in which the statement is . . . unresponsive to the question asked"), *cert. denied*, 126 S. Ct. 38 (2006).[14]

As demonstrated in this case, the Fifth Circuit also confines *Bronston*'s legal defense of literal truth to answers that are non-responsive to the questions asked. Relying on circuit precedent,[15] the court flatly rejected petitioner's express request for *de novo* review of his *Bronston* literal truth defense and characterized the issue as a simple challenge to the sufficiency of the evidence. Pet. App. 29a n.16. As set forth in Part III below, this failure to afford plenary review to petitioner's literal truth defense was critical to the outcome of this case on appeal.

II. THE FIFTH CIRCUIT'S REFUSAL TO REVIEW *DE NOVO* CLAIMS OF FUNDAMENTAL AMBIGUITY AS A DEFENSE TO PERJURY IS CONTRARY TO THE POSITION OF EVERY OTHER CIRCUIT TO ADDRESS THE ISSUE

The circuits are also split on the proper standard for reviewing a claim that the prosecutor's questions are too ambiguous to support a perjury conviction. The vast majority

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[14] At least two other appellate cases have simply applied sufficiency of the evidence review to literal truth defenses in the context of answers that are responsive to the prosecutor's questions without expressly distinguishing *Bronston*'s holding. *See United States v. Lighte*, 782 F.2d 367, 373 (2d Cir. 1986) (applying sufficiency of the evidence review to claim of literal truth, and holding that evidence was not sufficient to support several of defendant's answers); *United States v. Yasak*, 884 F.2d 996, 1001 (7th Cir. 1989) (holding that literal truth claim presents a question of fact for the jury, and questioning whether a trial judge can ever dismiss a perjury claim as a matter of law based on literal truth defense).

[15] In *United States v. Bell*, 623 F.2d 1132, 1136 (5th Cir. 1980), cited by the court below (Pet. App. 29a n.16, 31a), the Fifth Circuit rejected the applicability of *Bronston* in the instance of responsive "yes or no answer[s]," and held that "defendant's understanding of the question is a matter for the jury to decide."

of circuits treat this claim as a legal issue, conducting *de novo* review of the questions, in the context of the surrounding colloquy, to determine whether they are ambiguous and, if so, whether the ambiguity is so great that the perjury charge may not, as a matter of law, be submitted to the jury.[16] The Fifth Circuit, by contrast, has rejected the notion that a claim of fundamental ambiguity raises a threshold legal issue for *de novo* review. Instead, it requires submission of *all* ambiguous testimony to the jury and reviews only for sufficiency of the evidence.

The majority view, followed in the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits, is that the federal perjury statutes do not, as a matter of law, permit convictions where the questions on which the charged false answers are based contain "fundamental ambiguity." Because a "fundamentally ambiguous" question is "not amenable to jury interpretation," *Serafini*, 167 F.3d at 820 (internal quotation marks omitted), and *Bronston* requires precise questioning, these courts remove from the jury "the issue of a [fundamentally ambiguous] question's meaning,"

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[16] Many of these courts are explicit in stating that their review is "*de novo*" or "plenary." *See, e.g.*, *United States v. Culliton*, 328 F.3d 1074, 1079 (9th Cir. 2003) (conducting a "*de novo* examination" of the challenged questions); *United States v. Serafini*, 167 F.3d 812, 819 (3d Cir. 1999) ("plenary" review of fundamental ambiguity claim); *United States v. Farmer*, 137 F.3d 1265, 1268 (10th Cir. 1998) (applying "a *de novo* standard of review" and resolving the issue "as a matter of law"); *United States v. Swindall*, 971 F.2d 1531, 1553 (11th Cir. 1992) ("Review is *de novo*."); *United States v. Manapat*, 928 F.2d 1097, 1099 (11th Cir. 1991) (conducting "plenary" review).

Other courts plainly engage in such independent consideration of the question, without expressly characterizing the standard of review. *See, e.g.*, *United States v. Richardson*, 421 F.3d 17, 33 (1st Cir. 2005); *United States v. DeZarn*, 157 F.3d 1042, 1048-49 (6th Cir. 1998); *United States v. Robbins*, 997 F.2d 390, 395 (8th Cir. 1993); *United States v. Yasak*, 884 F.2d 996, 1003 (7th Cir. 1989); *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986).

Farmer, 137 F.3d at 1268. As the Second Circuit has explained:

> When a line of questioning is so vague as to be "fundamentally ambiguous," the answers associated with the questions posed may be insufficient as a matter of law to support [a] perjury conviction. Inasmuch as the issue then becomes one of legal sufficiency, a reviewing court may override a jury determination.

Lighte, 782 F.2d at 375 (citation omitted).

While acknowledging that "line drawing is inevitable" and a "precise[] defin[ition]" of "fundamental ambiguity" is "impossible," *Farmer*, 137 F.3d at 1269; *see also Lighte*, 782 F.2d at 375, these circuits agree that a question is fundamentally ambiguous when it does not possess "a meaning about which men of ordinary intelligence could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." *Lighte*, 782 F.2d at 375 (internal quotation marks omitted); *accord Farmer*, 137 F.3d at 1269; *see also United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004) ("[a] question is fundamentally ambiguous when men of ordinary intelligence cannot arrive at a mutual understanding of its meaning" (internal quotation marks omitted)); *United States v. Shotts*, 145 F.3d 1298, 1298 n.19 (11th Cir. 1998) ("[t]he government may not send people to prison for failing to correctly guess the government's meaning").

In *United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992), for example, the Second Circuit expressly reserved for the court the power to "reverse a jury's verdict . . . if we determine that a line of questioning is so fundamentally ambiguous that 'the answers associated with the questions posed may be insufficient as a matter of law to support the perjury conviction.'" *Id.* at 808 (quoting *Lighte*, 782 F.2d at 375). Conducting a *de novo* review of the question whether the defendant had "receive[d] any money," the court held that "there was some confusion as to whether the questioner was referring to [the defendant] in her

personal capacity, or as an employee[,] or as a member of the . . . territorial council." *Id.* at 809. This lack of specificity carried the question "from the realm of imprecision into the terrain of fundamental ambiguity," and required reversal of the conviction. *Id.*

Similarly, in *United States v. Serafini*, 167 F.3d 812 (3d Cir. 1999), the Third Circuit reviewed the dismissal of a perjury count alleging that the defendant had testified falsely concerning his knowledge of "another check." It conducted a careful examination of the question and its surrounding context and concluded that the question was "fatally ambiguous" with respect to which check it contemplated. *Id.* at 820 (internal quotation marks omitted). The court observed that "simple and straight-forward questions, which would have extinguished any potential ambiguity, were never asked." *Id.* at 822 (internal quotation marks omitted). The court concluded that "the lack of specificity [in the questions] [i]s a form of imprecision whose consequences must be laid at the table of the questioner, not the questioned," and upheld the dismissal of the count. *Id.* at 824 (internal quotation marks omitted); *see also Shotts*, 145 F.3d at 1298 n.19 (holding that question regarding "ownership" was fundamentally ambiguous as between legal and beneficial ownership).

Those circuits that remove "fundamentally ambiguous" questions from the jury agree that "[w]here a question considered in the proper context is only arguably ambiguous, . . . the defense of ambiguity [is viewed] as an attack upon the sufficiency of the evidence." *Farmer*, 137 F.3d at 1269. The Fourth Circuit takes an even more restrictive approach, however, holding that where there is any legitimate ambiguity in a question (and the defendant's answer is truthful under one reasonable construction), it is never appropriate to submit the issue to the jury. *See United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980) ("one cannot be found guilty of a false statement . . . when his statement is within a reasonable construction"); *United States v. Hairston*, 46 F.3d 361, 375 (4th Cir. 1995); *Camper*, 384 F.3d at 1078 (characterizing the

Fourth Circuit as having a "*per se* rule against perjury conviction for [any] ambiguous statement").

While the Fourth Circuit thus provides even greater protection against the submission of ambiguous questions to a jury than most circuits, the Fifth Circuit stands alone at the other end of the spectrum. It holds that *all* claims of ambiguity in connection with a perjury charge—including claims of "fundamental ambiguity"—raise questions of fact for the jury subject to appellate review for sufficiency of the evidence. Thus here, in response to petitioner's assertion that "conviction is precluded as a matter of law" because the questions at issue were "fundamentally ambiguous," Brown Br. at 66, the court ruled that petitioner had raised a simple challenge to the sufficiency of the evidence. Pet. App. 29a n.16.[17]

Under the approach of virtually every other circuit, by contrast, petitioner's claim of fundamental ambiguity would have been treated as a legal issue to be assessed by the court *de novo*. While the majority approach allows the jury to resolve "arguable" ambiguities in the examiner's questions, the court must in any event resolve the threshold issue of whether the level of ambiguity is such that the meaning of the question is not amenable to jury interpretation. This kind of *de novo* examination for fundamental ambiguity requires the court to examine the testimony carefully to determine whether, by a reasonable and definite interpretation, the jury could conclude that the witness understood the questions to have the meaning posited by the government. *See, e.g.*, *Farmer*, 137 F.3d at 1269-70. As demonstrated in Part III, when such a review is conducted in this case, it is apparent that the prosecutor's questions were fundamentally and fatally ambiguous.

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[17] This ruling was consistent with prior circuit holdings. *See, e.g.*, *United States. v. Parasiris*, 85 F. App'x 380, 381 (5th Cir. 2004) (per curiam) (rejecting "extra-circuit law" and holding that appropriate review is for evidentiary sufficiency "[e]ven if the term [at issue] was . . . 'fundamentally ambiguous'"); *Bell*, 623 F.2d at 1136 ("the defendant's understanding of the question is a matter for the jury to decide").

III. THE FIFTH CIRCUIT'S REFUSAL TO CONSIDER PETITIONER'S LEGAL DEFENSES THAT HIS ANSWERS WERE LITERALLY TRUE AND THAT THE PROSECUTOR'S QUESTIONS WERE FUNDAMENTALLY AMBIGUOUS CAUSED HIS CONVICTIONS TO BE AFFIRMED

The well-established defenses of literal truth and fundamental ambiguity mean that, as a matter of law, charges of making knowingly false statements under oath require more than proof beyond a reasonable doubt that the defendant intentionally conveyed a false and misleading meaning. Expressing concern about "oppression" of witnesses submitting to testimonial examination, and thus of a need to protect the investigative process itself, the Court in *Bronston* placed on the questioner—generally the prosecutor—the further burden of asking precise questions "to pin the witness down to the specific object to the questioner's inquiry." 409 U.S. at 359-61.

That imperative of "[p]recise questioning" "as a predicate for the offense of perjury," *id.* at 362, in *Bronston* led to a rule that a witness may not be convicted of lying based on a statement that is literally true, even if demonstrably and intentionally misleading. Rather than simply rest prosecution upon such a literally true though perhaps cleverly misleading statement, the Court held, it was incumbent on the questioner to follow up and secure an answer that was demonstrably false in fact, and not just by implication. In a larger category of cases invoking the fundamental ambiguity defense, courts have held that the imperative of precise questioning forecloses perjury prosecution where the questioner's lack of precision leaves it a matter of guesswork and conjecture whether a defendant's words conveyed a truthful or a false meaning.

Each of these legal defenses would have been independently dispositive in petitioner's favor had the court below not refused outright to consider them. With respect to the first grand jury statement charged by the government, petitioner provided a literally truthful description of the terms of the barge

transaction. Immediately before that statement, petitioner was asked to review an e-mail exchange (which he had never before seen) between two Enron employees. The following colloquy ensued:

> Q: Do you see where it [e-mail from Glisan, Grand Jury Ex. 11, Pet App. 72a] says, "To be clear, Ene. (Enron) is obligated to get Merrill out of the deal on or about June 30th?"
>
> A: Yes, sir.
>
> Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?
>
> A: <u>It's inconsistent with my understanding of what the transaction was</u>.

Pet. App. 26a n.15, 65a (underlining indicates statements alleged to be false).

A virtually identical question followed immediately, which made reference to another e-mail message contained in the same document, and asked whether petitioner understood why Enron would believe "it was required . . . to get Merrill out of the deal by June 30th." In this response, petitioner again affirmed that his "understanding of the transaction" was that Enron was "not required to get us out." Pet. App. 26a n.15, 66a-67a.

Petitioner thus clearly conveyed that the terms of the "transaction" neither "obligated" nor "required" Enron to "get [Merrill] out." In so stating his understanding of a particular documented business transaction, petitioner was plainly telling the truth. It is undisputed, as Judge DeMoss explained, that the final written agreements made no mention of any obligation to relieve Merrill of its investment, either by a buyback or a third-party purchase. Pet. App. 44a-45a. Accordingly, petitioner's first alleged false statement was literally true and should not have been submitted to the jury.

The government may argue that this first alleged false statement is not literally true because petitioner's statement—that an "obligat[ion]" to get Merrill out was contrary to his understanding of the "transaction"—is susceptible to an alternative interpretation, namely to refer to an oral side promise that did not appear among the obligations contained in the legal documentation of the transaction. Even if that were correct, though, the government's questioning would be fundamentally ambiguous because the prosecutor completely failed to make clear that this alternative was his intended meaning. *See, e.g.*, *Serafini*, 167 F.3d at 824; *Markiewicz*, 978 F.2d at 809; *Shotts*, 145 F.3d at 1298 n.19.

Under *Bronston*'s requirement of precise questioning, it was incumbent on the prosecutor to follow up, if that was the meaning on which he sought to rely. Yet nowhere in the grand jury testimony did the prosecutor even once ask about petitioner's awareness of an "oral" promise, a side or collateral promise, or an assurance or commitment made separate and apart from the formal legal documentation of the transaction. Even when petitioner later mentioned a "discussion" in the context of the second charged question and then noted a "comfort" and "assurance" "from Enron that we would be taken out of the transaction within six months," Pet. App. 27a n.15, 69a-70a, the prosecutor did not follow up to seek any detail or elaboration on the who, what or when of these assurances. Instead, he simply stayed with his game plan of showing petitioner documents he had never seen and asking—as he did with all three of the charged inquiries—if petitioner understood why the document would contain a certain reference. Under the circumstances, *Bronston* and the fundamental ambiguity defense mean that petitioner cannot be made to bear the risk of the jury's conjecture that he could have intended in his first charged statement to deny an oral "obligation" to "get Merrill out."

That the first statement cannot, as a matter of law, support a perjury charge requires reversal of petitioner's convictions.[18] In any event, however, the second and third statements charged in the indictment likewise fail as a matter of law to support a perjury charge. The government's questions came just a few minutes after the first charged exchange and directly after a few more related questions and answers. Pet. App. 66a-69a. The prosecutor put in front of petitioner an LJM2 document (Pet. App. 74a-75a), which included a "Description of Transaction," and proceeded to question petitioner as follows:

> Q: Now, do you see in this document where it describes *the transaction*, and the document is dated June 29th of 2000?
>
> Do you see the first sentence where it says, "Enron sold barges to Merrill Lynch in December of 1999, promising that Merrill would be taken out by sale to another investor by June 2000"[?]
>
> Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?
>
> A In - no, I don't - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.

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[18] As this Court held in *Yates v. United States*, 354 U.S. 298 (1957), a general verdict must be reversed where one of multiple charged grounds is improper as a matter of law. *Id.* at 312; *see also* Pet. App. 21a (applying *Yates* to vacate conspiracy and wire fraud convictions in this case). Lower courts have thus held that a general verdict of perjury cannot stand if any one of several charged statements is based on a legally insufficient theory of perjury. *See United States v. Richardson*, 421 F.3d 17, 31-32, 36 (1st Cir. 2005); *United States v. Lighte*, 782 F.2d 367, 377 (2d Cir. 1986); *United States v. Damrah*, 334 F. Supp. 2d 967, 971-72 (N.D. Ohio 2004).

> Q: So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by sale to another investor by June of 2000?
>
> A: No.

Pet. App. 27a n.15, 69a (underlining indicates statements alleged to be false; added emphasis indicated by italics).

Petitioner's answers were literally true because the questions were premised on statements in a document concerning a "Description of Transaction." As explained above, there was no promise that was any part of the formal documentation of the transaction between the parties, so the "Description of Transaction" in the LJM2 summary did not comport with the actual terms of the transaction. While the Fifth Circuit characterizes distinctions such as these as "hyper-technical word choice," Pet. App. 31a, courts that apply *Bronston*'s literal truth defense to responsive answers demand just such a focus on the precise meaning of the relevant questions and answers, *see supra* Part I.

At a minimum, the questions that elicited Brown's denial of a promise were fundamentally and fatally ambiguous. Once again, the prosecutor did not ask whether there was an "oral" promise or a promise separate and apart from the transaction itself. Moreover, the prosecutor's second question—in reality, several questions compounded—exemplifies the imprecision with which the prosecutor examined petitioner. As petitioner's halting response to this quagmire of questions makes clear, he struggled to grasp the thrust of the prosecutor's inquiry.

The government may argue that in mentioning "a discussion" and stating his belief that "it was not a promise," petitioner in fact denied the existence of any oral promise. But the prosecutor did not ask a single question to follow up on this volunteered reference. He did not seek to know the parties involved, the time or date of the discussion, or anything that was said. Due to the prosecutor's failure to pursue the inquiry, there is no way to know what discussion petitioner was

referring to, or whether his description of it as "not a promise" was true. As this Court emphasized in *Bronston*, the prosecutor's failure to refine his questioning to the specific object of the inquiry must be borne by the government and not petitioner. *See Bronston*, 409 U.S. at 358 ("we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question").

* * * *

The court below is the only circuit in the country that treats the fundamental ambiguity defense as a matter for deferential sufficiency of the evidence review. Simultaneously, it limits *Bronston*'s literal truth defense to the unique facts of that case, where a non-responsive answer is arguably misleading. Thus, for nearly all criminal allegations of knowingly false statements under oath, the Fifth Circuit, alone among the circuits, categorically refuses to perform the gatekeeper role defined in *Bronston*. In the Fifth Circuit, every question of literal truth and every ambiguity, fundamental or otherwise, is simply another issue for the jury. This dereliction has its most ominous consequences in cases like this one, where emotions run high in the wake of public scandal, and there is risk that the honor and livelihood of honest individuals, like petitioner, will take a back seat to the need to place blame. These issues accordingly merit the attention of the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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