No. 18-

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IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL LOWRY, ROBERT MULGREW
and THOMASINE TYNES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Bronston v. United States*, 409 U.S. 352 (1973), this Court declared that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner – so long as the witness speaks the literal truth. The burden is on the questioner …." The Court further emphasized that "[p]recise questioning is imperative as a predicate for the offense of perjury." In this light:

Can responses to fundamentally ambiguous questions – or literally truthful answers to unambiguous questions – constitute "false declarations" before a federal grand jury under 18 U.S.C. § 1623, on the basis that (a) forbidden imprecision in questioning is limited to "glaring instances of vagueness or double-speak … that … would mislead or confuse a witness"; or that (b) the grand jury witnesses should have understood from the "thrust" of the line of questions that the prosecutors meant something other than what they actually asked?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioners and respondent United States). Co-defendants Henry Alfano and William Hird are filing a separate petition, which is related to the instant petition as explained under Point 2. There were other co-defendants at trial; those individuals either were acquitted or have not joined in the petitioners' appeal.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Michael Lowry, Robert Mulgrew, and Thomasine Tynes jointly petition this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Third Circuit affirming their convictions and sentences for making false statements before a federal grand jury.

OPINIONS BELOW

The Third Circuit's precedential opinion (per Nygaard, J., with Greenaway & Fisher, JJ.), filed January 18, 2019, is Appendix A. It is published at 913 F.3d 332, *sub nom. United States v. Hird*. The United States District Court for the Eastern District of Pennsylvania (Kelly, J.) wrote a memorandum opinion, filed July 1, 2013, *sub nom. United States v. Sullivan*, addressing petitioners' pretrial motion to dismiss the mail and wire fraud counts (of which they were acquitted at trial). That opinion is not published in the Federal Supplement but is available at 2013 WL 3305217; a copy is Appx. B. The District Court (Stengel, J.) also wrote an unpublished memorandum opinion on the denial of post-trial motions, filed November 6, 2014, and available at 2014 WL 5795575. Appx. C. The orders granting in part petitioner Mulgrew's and Tynes's petitions for rehearing of the Court of Appeals' initial (since withdrawn) opinion (901 F.3d 196), filed concurrently with the amended opinion, are available at 913 F.3d 392 and 913 F.3d 393, respectively.

JURISDICTION

On January 18, 2019, the United States Court of Appeals for the Third Circuit filed its amended opinion and judgment affirming the petitioners' convictions. Appx. A. This opinion superseded an earlier-filed opinion, *see* 901 F.3d 196 (August 21, 2018, since withdrawn), and followed the granting, in part, of petitions for rehearing by these petitioners. On February 7, 2019, the Court of Appeals denied motions for leave to file further rehearing petitions. As a result, pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari by any of the petitioners was initially due on or before April 18, 2019. By order dated April 11, 2019, under Dkt. 18A1048, Justice Alito extended the time for filing a petition for a writ of certiorari until May 18, 2019, and then, by Order dated May 13, 2019, further extended the time to June 17, 2019. This petition is timely filed on or before that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTES INVOLVED

Title 18, U.S. Code, provides, in pertinent part:

§ 1623. False Declarations Before Grand Jury or Court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any

book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

* * * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

STATEMENT OF THE CASE

Petitioners Michael Lowry, Robert Mulgrew and Thomasine Tynes were elected, non-lawyer judges of the Philadelphia Traffic Court. A federal grand jury indicted them for devising and executing scheme to defraud the City and State of revenues in the form of fines and penalties that would allegedly have become due upon a proper adjudication of alleged traffic offenses.[1] The government's theory was that the

[1] Petitioners filed or joined in pretrial motions to dismiss these charges as failing to state a cognizable theory of "property"-based mail and wire fraud under 18 U.S.C. §§ 1341, 1343, and 1349. The pretrial motions were denied. Appx. B. Co-defendants Henry Alfano and William Hird pleaded guilty to the fraud charges under an agreement allowing them to preserve those issues for appeal, which was unsuccessful. Appx. A. Their separate petition for certiorari is being filed contemporaneously with this one. *See* Point 3 of the Reasons for Granting in this Petition, *post*.

judges of Traffic Court systematically gave special "consideration" to favored litigants in their court. (There was no accusation, however, nor any evidence, that any of them took bribes or otherwise profited from this supposed "scheme.") After a lengthy trial at which the particulars of numerous alleged traffic violations were examined, and at which the evidence showed that the judges had wide discretion to show leniency to accused drivers without strict regard for legal rules, the petit jury acquitted the petitioners and their co-defendants of all such charges.

At the same time, the jury convicted each of the petitioners of one or more instances of alleged false declarations before the grand jury in violation of 18 U.S.C. § 1623, a kind of perjury. In particular, petitioner Lowry was alleged to have responded falsely to a single question:

> Q. So if I understand your testimony, you're saying you don't give out special favors; is that right?
>
> * * *
>
> A. No, I treat everybody in that courtroom the same.

Appx. 31a. Like Lowry, petitioner Mulgrew was convicted on one count, based on his responses to two questions alleged to be part of a single inquiry:

> Q. How about your personal, has your personal received any calls like that from other judges, other ward leaders that she's conveyed to you, saying so-and-so has called about this case?
>
> A. If she did, she didn't convey them to me.
>
> * * * *
>
> Q. Let me make sure as well that if I got your

testimony correct [sic]. You're saying that if other people, whether they be political leaders, friends and family, anybody is approaching your personal and asking her specifically to look out for a case, see what she can do in a case, give preferential treatment, however you want to phrase it, that she is not relaying any of that information on to you; is that correct?

A. No, she isn't.

Appx. 37a.[2]

Finally, petitioner Tynes was indicted and convicted on two separate counts of perjury. The first alleged that she answered falsely as follows:

Q. In all the years you've been [at Traffic Court] have you ever been asked to give favorable treatment on a case to anybody?

A. No, not favorable treatment. People basically know me. The lawyers know me. The court officers know me. I have been called a no-nonsense person because I'm just not that way. I take my position seriously, and the cards fall where they may.

Appx. 25a. The second count was based on a separate and later exchange:

Q. You've never taken action on a request?

A. No.

Appx. 26a. Each petitioner was sentenced to a term of imprisonment, all of which have been fully served.

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[2] A judge's "personal," in the Philadelphia courts, means essentially the judge's "tipstaff" or courtroom deputy, sometimes referred to as "personal assistant" to the judge.

On appeal, petitioners Tynes and Lowry argued that the questions to which they allegedly responded falsely were fundamentally ambiguous, and thus immune from perjury prosecution under this Court's decision in *Bronston v. United States*, 409 U.S. 352 (1973), while Mulgrew argued that his responses were literally truthful, measured against the ill-framed questions he was asked. This, too, would require reversal under *Bronston*. Tynes also invoked literal truth as a defense for one of her answers.

The U.S. Court of Appeals for the Third Circuit rejected these arguments in a precedential opinion, and affirmed the three petitioners' convictions. Appx. A. The court of appeals ruled that the "fundamental ambiguity" doctrine applies only to "glaring instances of vagueness or double-speak by the examiner at the time of questioning (rather than artful post-hoc interpretations of the questions) that—by the lights of any reasonable fact-finder—would mislead or confuse a witness into making a response that later becomes the basis of a perjury conviction." Appx. 23a. The court below further held that a defense of literal truth to the particular question asked could be defeated by reference to the "thrust" of a prosecutor's line of questions. Appx. 39a.

This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

1. The decision of the court below disregards this Court's precedent and conflicts with the decisions of other circuits.

This case presents several interrelated aspects of the rule laid down for federal perjury prosecutions some 45 years ago by this Court in *Bronston v. United States*, 409 U.S. 352 (1973). The Court decided in *Bronston* that "precise questioning is imperative as a predicate for the offense of perjury." *Id.* 362. "The burden is on the questioner to pin down the witness to the specific object of the questioner's inquiry." *Id.* This ensures that only responses that are both "false" and "knowingly" so are made predicates for conviction, as the statute requires.[3] Even where a witness's answers were "intentionally misleading," "any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." *Id.* 363. It follows from these principles that the consequences of any imprecision in the questioning must fall at the feet of the inquisitor. At odds with numerous decisions in other circuits, the opinion of the court below contravenes the governing rule established in *Bronston*.

The government sought a ruling in *Bronston* that a witness's evasive, deliberately unresponsive answer can be deemed "false" under perjury law even if literally accurate. In a unanimous opinion authored by the Chief Justice, this Court unanimously rejected the

[3] *Bronston* arose under 18 U.S.C. § 1621, but the same principles apply equally to § 1623 prosecutions, as here.

government's attempt to carve out an exception from the settled, pre-existing, common-sense, general legal rule that a statement that is literally true cannot be criminalized as "false." "[T]he perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner – so long as the witness speaks the literal truth. The burden is on the questioner ...." 409 U.S. at 360.[4]

This case presents issues under both of the most common applications of the foundational principles of perjury law established in *Bronston*. One is that a literally truthful answer (even if misleading) cannot be the predicate for a perjury conviction. The other is that fundamental ambiguity in a question prevents the answer from being prosecuted as perjury. Underlying both is the understanding that a perjury conviction fails unless the government proves beyond a reasonable doubt that the witness understood the cited question, at the time that she answered it, in a way that would make her allegedly-perjurious answer false. That is why "precise questioning is imperative as a predicate for" perjury. 409 U.S. at 362.

These core principles cannot be reconciled with the opinion of the court below, which allowed petitioner Mulgrew's *clear* answers to *unambiguous* and narrow questions, for example, to be reinterpreted as false responses to *unstated and broader* questions inferred

[4] Accordingly, the principles governing perjury prosecutions established by *Bronston* are by no means limited to cases where a defendant has been accused of making a statement that is unresponsive as well as literally true. The simple fact is that a statement that is literally true is not and can never be "false" in a prosecution under 18 U.S.C. § 1621 or § 1623.

from the overall "thrust of the Government's line of questions" (Appx. 39a), the "thrust of the inquiry" (*id.*), the content of a "follow up question," or the "focus" of the line of inquiry (*id.*). See also *United States v. DeZarn*, 157 F.3d 1042, 1051 (6th Cir. 1998) (mistakenly applying *Bronston*'s "literal truth" rule only to unresponsive answers).

The court below requires the witness to divine (from the "thrust" of the questions, rather than their words) what question the prosecutor meant to ask, and then to answer that question instead. The *Bronston* rule leaves no such room for shifting the burden of clarity to the witness. ("burden is on the questioner"). It is the questioner, this Court held, who bears the burden of asking precise questions that communicate the "specific object of the inquiry" and "pin the witness down." 409 U.S. at 360. A witness, like Mulgrew, who answers truthfully the precise question asked cannot be convicted of perjury.

The doctrine of "fundamental ambiguity" is but another application of the same rule. No special gloss on the basic principles of perjury (and evidentiary sufficiency) is necessary to formulate it. It simply requires proof beyond a reasonable doubt that the defendant knew what the questioner was asking – proof without which the jury cannot find that the defendant knew that his answer was false. When a term cannot be used with mutual understanding absent a definition, it is impossible (and unlawful) to conclude that the defendant understood the question posed, which is a logical prerequisite to any conviction based on the claim that a declaration was knowingly false.

The court below affirmed petitioners' perjury convictions by drastically limiting the application of these foundational precepts. As with its treatment of the "literal truth" rule, its opinion put the burden on the witnesses to resolve fundamental ambiguities in the prosecutors' questions by requiring each witness to infer, from the "focus" of the inquiry, what the questioner meant to ask (but did not). Appx. 27a.

Indeed, the court below purported to limit the ambiguity inquiry to:

> glaring instances of vagueness or double-speak by the examiner at the time of questioning … that – by the lights of any reasonable fact-finder – would mislead or confuse a witness into making a response that later becomes the basis of a perjury conviction.

Appx. 23a. The Third Circuit is not the only court to have misread this Court's standard in this way. See *United States v. Robbins*, 997 F.2d 390, 394–95 (8th Cir. 1993) ("The literally true answers to the questions that are the basis of the false oath charge must be considered in the context in which they were given."; for jury to determine whether defendant knew prosecutor intended to refer to different corporation than he asked about); *cf. United States v. Weiss*, 930 F.2d 185, 200–02 (2d Cir. 1991) (Restani, J., dissenting).

The standard applied below cannot be reconciled either with this Court's precedent or with the case law of most of the circuits, thus requiring this Court's intervention. The other circuits have long held that a perjury conviction cannot stand when predicated upon a question that lacks "a meaning about which men of ordinary intellect could agree, nor … could be used

with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered." *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986). A conviction must not be upheld on the basis that the witness "understood, or should have understood, the import behind the prosecutor's questions." *United States v. Eddy*, 737 F.2d 564, 569 (6th Cir. 1984). No perjury conviction can stand on the basis of "a particular interpretation that the questioner placed upon an answer." *United States v. Shotts*, 145 F.3d 1289, 1298 (11th Cir. 1998) (reversing § 1623 conviction because answer was literally true).

The court of appeals' tolerance in petitioners' case for ambiguous questioning cannot coexist with the prohibition against ambiguity that the Court established in *Bronston*. This Court's rule offers no safe harbor to government questioning that is too imprecise to create a "mutual understanding" but falls short of "glaring [] double-speak" that would affirmatively mislead or confuse.

Numerous other courts have vacated convictions predicated upon responses to questions that would be excused under the Third Circuit's test. See, *e.g.*, *United States v. Wall*, 371 F.2d 398, 400 (6th Cir. 1967) (denial of having "taken any trips" with a certain individual, when the defendant was with the person in another state but had not traveled with him) (discussed in *United States v. Chapin*, 515 F.2d 1274, 1280 (D.C. Cir. 1975)); *Lighte*, 782 F.2d at 376 (failure to specify whether use of "you" referred to the witness's actions as a trustee or as an individual). None of these terms suffers from "glaring" vagueness; none is "double-speak"; none would affirmatively

"mislead or confuse." Yet none can support a perjury conviction, because none has "a meaning about which men of ordinary intellect could agree." *Lighte*, 782 F.2d at 375. Under *Bronston*, the threshold question must always be whether prosecutors have discharged their duty to communicate the object of the questioning and hold the witness to it. *Bronston*, 409 U.S. at 360.

The same flaw infects the decision of the Third Circuit with respect to the petitioners' responses that were literally truthful. For example, as to petitioner Mulgrew's response that to his knowledge his assistant had not received "any calls like that," the opinion states:

> The transcript makes it obvious that Mulgrew's singular reliance on the reference to a "call" ignores the thrust of the Government's line of questions. The questions focus on the substance of the communications between Mulgrew's personal assistant and himself, rather than the mode of those communications.

Appx. 39a. As to the second question and answer, the opinion similarly contradicts *Bronston* by blaming the witness rather than his interrogator for a response that was true, even if it may have avoided what the prosecutor meant to ask about (but didn't):

> [A]s with the first question, Mulgrew cherry-picks a small part of the question out of context, distorting it. The full text and follow up question show that the thrust of the inquiry was whether Mulgrew's personal assistant was informing him of the names of those requesting preferential treatment from him. And Mulgrew's response to the follow-up question—saying that he did not

> want to know so that he did not have to worry about what he did in the courtroom—is consistent with one who understood this.

Appx. 39a–40a. It is on this foundation that the panel concluded:

> that, ultimately, the evidence is sufficient for a reasonable jury to conclude Mulgrew understood that both of these questions were focused on whether his personal assistant informed him of requests for him to give preferential treatment, and that he answered in the negative to both.

Appx. 40a. The court below thus treated a defense of literal truth as if it were an attack on an ambiguous question, where petitioner Mulgrew's argument was never that.[5] The issue was not whether petitioner knew or understood why he was under investigation (which he may very well not have, nor did the prosecutors necessarily even know, at that early stage). The question, in a perjury case, is whether the cited answers to *those* questions were false, and knowingly so.

Attention by a lay witness to the precise wording of the question posed by a professional interrogator such as a federal prosecutor is not to be derided as "cherry-pick[ing] a small part of the question" or "distorting" its meaning. Appx. 39a. The question

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[5] Petitioners Tynes and Lowry did contend that the questions asked of them were ambiguous. Nearly the entire introductory discussion of the *Bronston* rule in the opinion of the court below focused on the problem of ambiguous questioning. *See* Appx. 21a–23a. Nevertheless, both doctrines – "fundamental ambiguity" and "literal truth" – flow from *Bronston*'s firm stand that precise questioning is a prerequisite to any perjury conviction for making a "knowingly … false" statement.

about "calls" is the question Mulgrew was charged with, and convicted for, answering falsely.[6] Context, such as the "thrust" of a line of antecedent questions, can be used by a jury to infer that a defendant was not confused by a question that invites more than one interpretation, where confusion is claimed as a defense, or to protect against misinterpretation of an answer, but never to alter a question's literal meaning if the question on its face is unambiguous.

Bronston itself demonstrates that the "context" of questioning is not to be consulted in a manner that eliminates the requirement of looking to the precise question asked and answer given, where there is no claim that the witness (now defendant) was confused. 409 U.S. at 361–62. Where the specific questions and

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[6] By challenging his conviction for perjury on a particular question asked before the grand jury, petitioner did not seek to "impl[y]" that "had the Government asked him about receiving index cards with such requests," rather than being asked whether his assistant had received "any calls like that," then "his answer would have been completely different." Appx. 37a. No one knows what his answer would have been to some question that was never asked. See *United States v. Laikin*, 583 F.2d 969, 971 (7th Cir. 1978) ("defendant was not required to answer the unasked question," since *Bronston* burden is on questioner to pin the witness down; answer given was "literally true and [r]esponsive" to question that was asked). As the quoted passage reveals, the approach of the court below, in contradiction to *Bronston*, is essentially inconsistent with the presumption of innocence. A court must assume that a witness's answer to some other question would have been truthful, not the opposite, as the Third Circuit panel insinuated. Similar disdain for the possibility of innocence infected the court's disposition in the same opinion of the scope-of-mail-fraud issue, Appx. 15a–16a, as shown in co-defendants Alfano and Hird's separate petition.

answers charged and on which a conviction is predicated are not ambiguous, reference to the context of the questions – or worse, to the content of a "follow up question" posed *after* a charged answer was given, Appx. 39a – is not allowed. If it were, all the evils and unfairness would emerge that the precise questioning requirement is intended to prevent.

The decisions of other circuits illustrate the point and reveal how badly the decision of the court below deviates from the governing rule. See *United States v. Hairston*, 46 F.3d 361, 375–76 (4th Cir. 1995) (reversing perjury and subornation convictions where "the prosecutor did not use the requisite specificity in questioning, despite Mack's apparent confusion or evasion" as to meaning of terms); *United States v. Porter*, 994 F.2d 470, 475 (8th Cir. 1993) (reversing conviction where "Defendant did not commit perjury simply by answering the questions in a narrow, arguably evasive fashion, giving a literal meaning to the words "mail" and "generate"); *United States v. Reverson-Martinez*, 836 F.2d 684, 690 (1st Cir. 1988) (reversing § 1621 conviction where "the government is saddled with what was *said*, rather than what might have been meant" by defendant whose response was literally true under his apparent interpretation of question) (emphasis original). "When a witness bobs and weaves, it is the questioner's obligation to get the proper bearings; a federal perjury prosecution is medicine too powerful to be dispensed casually as a quick fix for unresponsiveness." *Id.* 691. *Cf. United States v. Larranaga*, 787 F.2d 489, 496–97 (10th Cir. 1986) (reversing where government's failure to ask more specific questions left an ambiguity in response that was only untrue by negative implication).

In conflict with this Court's authority and the decisions of the other circuits, the decision of the court below dilutes the requirement of proof beyond a reasonable doubt that the defendant understood the questioning and intended to lie. Only defendants questioned by "glaring[ly]" incompetent or treacherous prosecutors would be protected by the foundational principles of perjury prosecutions. The court below blames and penalizes the witnesses for not answering questions that the prosecutors, in hindsight, wish they had asked, and for not disregarding the particular question in favor of an interpretation of the "thrust" of the questioning as a whole, including subsequent inquiries. Neither controlling precedent nor fundamental fairness can tolerate such a result.

Accordingly, this petition should be granted.

2. This case offers an excellent vehicle for clarifying the *Bronston* rule governing perjury prosecutions, not only because of the petitioners' acquittals on all non-perjury charges, but more importantly because variations in the questioning of the three petitioners permit the Court to examine a number of common applications of that seminal decision.

As shown under Point 1, the issues at stake in this case are important, and the holding of the court below conflicts with this Court's precedent and the rulings of other circuits. The record of the instant case also offers a good vehicle for the discussion and resolution of such questions. After a lengthy trial, the jury entirely rejected the government's underlying theory of this case, acquitting every defendant of all charges

of mail and wire fraud. So far as the jury could find, based on an extensive presentation of direct and circumstantial evidence, there was no fraud in the operation of the Philadelphia Traffic Court,[7] or at least not in these petitioners' courtrooms. As the jury learned at trial, any tradition of "consideration" that existed resulted not in corrupt "ticket-fixing," but only in the kind of lenient and sympathetic outcomes in particular cases that might eventuate anyway in such an informal, lawyerless, minor tribunal, simply from the accused drivers' showing up and telling their stories. Thus, it is highly likely that the responses sworn to by the petitioners before the grand jury were in fact given in good faith, even though they denied most if not all of the wrongdoing of which the prosecutors, however mistakenly, then believed them guilty. Protecting such suspects from perjury convictions is a basic goal of the rule established by this Court in *Bronston*.

Petitioners' case offers an excellent vehicle not only because the acquittals make this a pure case of alleged perjury with no complicating other charges, but also for another reason. The questions and answers underlying the charges here are few in number (one count each for Mulgrew and Lowry; just two for Tynes) yet they present a fair sampling of the various issues that arise in the dozens of cases prosecuted in the federal courts each year that require application of the rule established in *Bronston*. The proper meaning and enforcement of that precedent

[7] Much less was there any bribery, as the government appears to have suspected during the grand jury investigation but never charged, as the court below mentions. *See* Appx. 28a–29a.

with respect to claims of "fundamental ambiguity" are presented, as well as a defense of "literal truth."

The validity of a perjury conviction cannot depend on a defendant's ability to establish that she did not understand a term the way that the prosecutor later asserts that he intended it. Yet that is the burden that the court below imposed in petitioner Tynes's case. The court opined, for example, that the record fails to show "any reason why" Tynes would interpret the grand jury questioning as addressing a different definition of "favorable treatment" than the government invoked. Appx. 29a. In so doing the court skipped a crucial step: finding evidence in the record that would support a finding by the jury that the prosecutor had communicated to petitioner the convoluted "consideration" theory that was advanced at trial, but which no one – not an investigating agent, not a prosecutor, not even the press – had articulated, let alone articulated to Tynes, at the time she was questioned.

Here, so far as trial jury knew, the questioning of petitioner Tynes *began* with the question about "favorable treatment" that underlay Count 71. It was unquestionably plain that the prosecutor was not giving "favorable treatment" its ordinary meaning in that question, that is, an outcome in court that would be in the party's favor – which of course is what every litigant seeks in every case. Yet the prosecutor did nothing to enlighten his witness as to the meaning he intended, which later was said to have something to do with improper motive on the part of the judge. The trial jury had no evidence before it that would establish beyond a reasonable doubt that Tynes had divined his intent. Literally nothing in the record

permits the conclusion that petitioner Tynes knew, when she answered in the grand jury room, the novel and highly-specific construction that the prosecutor put on the term: "consideration," which he also called "ticket-fixing" – a concept that eventually required multiple layers of definitions to charge. See CA3 Appx. 195a–196a (Indictment ¶¶ 30, 32). *Bronston* required reversal for this fundamental failure of proof, and did not allow a shifting of responsibility to the witness (later, defendant).

The "consideration" theory later espoused was far more esoteric than the concept of bribery, which petitioner Tynes seemingly inferred was the matter under investigation, and which she could truthfully deny. Because the evidence did not establish beyond a reasonable doubt that petitioner Tynes necessarily answered the idiosyncratic "consideration" theory rather than the common bribery theory (or another theory entirely), reversal is required. See, *e.g., Chapin*, 515 F.2d at 1280 (D.C. Cir.) (discussing with approval *Wall*, *supra* (6th Cir.), which reversed a perjury conviction because defendant's interpretation of term was more common than government's).

Indeed Tynes's case provides a powerful example of the kind of ambiguity that *Bronston* makes fatal. Even *the Third Circuit panel* was confused by the distinction between "consideration" (as a sort of ticket-fixing) and bribery − asserting later in its opinion that the record supports "no reasonable inference that the Government was asking [Tynes] about matters outside of the alleged bribes." Appx. 29a.[8] That is the defense argument (and presumably

[8] In point of fact, nothing in the 26 pages of grand jury transcript that preceded the charged question and answer

the opposite of what the panel meant to say): that the record does not support an inference that the government was asking about anything outside of bribes.[9] Tynes's denial of giving "favorable treatment" (in the sense of allowing herself to be bribed), if that was her understanding, was not and could not be perjury.

Petitioner Lowry's case is likewise a useful source for discussion of the problem of ambiguity under *Bronston*. Lowry was convicted for responding untruthfully to a question in which the prosecutor asked whether she correctly understood Lowry's testimony, in substance, to be that he did not "give out special favors." Lowry replied, "No," adding that he treated "everybody in that courtroom the same." Appx. 31a. As the appellate panel said it recognized, Appx. 21a, "[p]recise questioning is imperative as a predicate for the offense of perjury." *Bronston*, 409 U.S. at 362. Yet the prosecutor's ill-framed, multi-layered, compound and ambiguous question not only turned on an undefined use of "special favors," but also made the intended referent for Lowry's introductory "No" hopelessly uncertain. Government counsel then left unexplored with follow-up what the way

(cont'd)

gave any hint of what "favorable treatment" meant at all. The immediately preceding topic was the social life of other Traffic Court judges. Because those pages were not in evidence, however, the jury could only speculate about the context preceding the question charged in Count 71 – but even had the jury had the pages, they would not have clarified the intended meaning, at the time the question was asked, of "favorable treatment."

[9] At the time of the questioning, after all, nothing was yet "alleged," and after investigation no "bribes" were ever stated to be the government's theory.

was, according to Lowry, that everyone in his courtroom was treated. Again, the nature of the inquiry made the question "fundamentally ambiguous," and should have precluded, as a matter of law, any conviction. Instead, the court below put the burden on Lowry for not responding to that question in accordance with what the prosecutors' "line of questioning reasonably supports …." Appx. 32a.

As to petitioner Mulgrew, his sufficiency challenge was governed by yet another common application of *Bronston*'s rule that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner – so long as the witness speaks the literal truth. The burden is on the questioner ...." 409 U.S. at 360. Thus, the instant case presents a good vehicle to discuss not only the nature of "fundamental ambiguity" in questioning, but also the scope of *Bronston*'s "literal truth" rule. See *United States v. Sarwari*, 669 F.3d 401, 406–07 (4th Cir. 2012) (collecting cases giving this rule a narrow rather than the intended strict interpretation). Rather than accept that Mulgrew's response to the question asked was literally accurate, as measured against the precise question asked, the court below looked to its own view of the overall "thrust" of the entire line of questions to sustain the conviction.

For these reasons, the instant petitioners' case affords an excellent vehicle for the elaboration and explication of several aspects of this Court's *Bronston* rule – both "fundamental ambiguity" in questioning, and "literal truth" in answers.

3. At least, this petition should be held pending disposition of the petition filed by co-defendants Alfano and Hird.

Petitioners Lowry and Mulgrew joined co-defendants Alfano and Hird's motions to dismiss the mail and wire fraud charges for lack of a valid theory of property deprivation under this Court's cases. On appeal, they argued that being forced to stand trial for over a month, having to confront and justify dozens of past favorable dispositions of various minor traffic tickets cherry-picked by the government to raise suspicions about their integrity and fairness, prejudiced the jury's ability to apply the rules of law to the perjury charges, notwithstanding the eventual acquittals of fraud. The Court of Appeals did not reach this "prejudicial spillover" argument, because it rejected the Alfano-Hird argument for dismissal of the fraud counts (referred to in the opinion below as "Sullivan's motion"; *see also* Appx. B) on the merits. Appx. 23a n.24.[10]

Petitioners' erstwhile co-defendants Alfano and Hird have now petitioned this Court for a writ of

[10] Petitioner Tynes likewise sought to participate in the pretrial dismissal motion by submitting a proposed order allowing joinder. The court below held that effort procedurally deficient and disallowed her attempt to rely on it in support of the spillover prejudice argument on appeal. *See* Appx. 24a n.25; *but see* Appx. 23a n.24 (accepting that Tynes joined the motion). If this Court grants the Alfano-Hird petition and reverses, it should reject the Third Circuit's either self-contradictory or at least overly punctilious refusal of Tynes's joinder, and should remand her case as well.

certiorari to review the validity of the mail and wire fraud theory utilized in this case. If the Court does not grant the instant petition and reverse all the perjury convictions, then it should at least hold the instant petition pending consideration of Alfano's and Hird's. If that petition is granted and a reversal results, the affirmance of petitioners' convictions for perjury should then at least be vacated and remanded to the Court of Appeals for further consideration of the merits of their spillover argument.

CONCLUSION

For the foregoing reasons, petitioners pray that this Court grant their petition for a writ of certiorari.

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