No. 22-

In the

Supreme Court of the United States

ALEXANDER SAMUEL SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As Justice Ginsburg warned in *Brogan v. United States*, 18 U.S.C. §1001(a) "arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt." 522 U.S. at 409 (Ginsburg, J., concurring in the judgment). This warning was made manifest in the prosecution of Alexander Samuel Smith, whose conviction is based on his failure to recall the truth amongst the web of lies spun by government investigators and undercover contractors.

The question presented is:

> Whether a statement made to FBI agents can be material and knowingly false under 18 U.S.C. §1001(a) when the criminal enterprise underlying the statement was completely fabricated by those same agents.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Alexander Samuel Smith, the defendant in proceeding below. The Respondent is The United States of America.

RELATED CASES

· *United States of America v Alexander Samuel Smith*, No. 3:17-cr-182, U.S. District Court for the Western District of North Carolina. Judgment entered August 11, 2020.

· *United States of America v Alexander Samuel Smith*, No. 20-4414, U. S. Court of Appeals for the Fourth Circuit. Judgment entered December 1, 2020.

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PETITION FOR A WRIT OF CERTIORARI

ALEXANDER SAMUEL SMITH respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit is reported at 54 F.4th 755 and is reproduced in the Appendix ("App") at 2a to 41a. The Judgment issued by the District Court is not reported.

JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on Dec 1, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute outlining the criminal offense of making false statements to a government agency provides as follows:

> Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully…(2) makes any materially false, fictitious, or fraudulent statement or representation;…shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both…" 18 U.S.C. §1001(a)

STATEMENT OF THE CASE

The FBI's investigation of Alexander Samuel Smith was not your average sting operation. In Mr. Smith's case, the government fabricated an entire criminal enterprise out of whole cloth, consisting exclusively of fictional characters. In fact, Mr. Smith was the only person involved in this fictional criminal enterprise who was not a persona created by the FBI. *See* Fourth Circuit Joint Appendix ("JA") 372, 388, 389, 391-2. This charade was transparent: "This is a made-up script. This isn't real. The [investigators] created the facts, the scenario, the background, and everything else. Without them there would be no ISIS. There was no real Mohamed Hilal. There was no real Abu Khalid." JA 372. The government then prosecuted Mr. Smith for alleged false statements regarding this fictious plot created by the FBI and undercover operatives.

1. The FBI created "Abu Khalid" and a fictional recruitment scheme. In 2004, Mr. Smith was a wayward youth and high school dropout who was taken in by Wael Kodaimati, a naturalized citizen and a Muslim, whose son was the same age as Mr. Smith. Mr. Smith became part of the Kodaimati family and adopted their religion. When the Syrian Civil War broke out in 2011, Mr. Kodaimati's wife and some of his family were trapped in the village of Kafr Hamrah, a suburb of Aleppo in an area contested by the Assad regime, the Free Syrian Army, and ISIS. JA 385, 387, 397, 435, 506, 544, 545, 547, 661, 664, 667, and 749.

According to agents of the Federal Bureau of Investigation, their Memphis field office received information in June 2014 from an FBI source that Mr. Smith had asked for assistance to travel to Syria to participate in the Syrian revolution. JA 489. In the summer of 2014, the war in Syria had been waging for more than three years and the situation was extraordinarily convoluted. Forces loyal to President Bashar al-Assad were battling a myriad of rebel groups including the Free Syrian Army,[1] Kurdish separatists, the Salafist jihadist organization Al-Nusra Front, the Islamic State of Iraq and Syria (ISIS), and others. The United States opposed Assad's government and provided aid to the Supreme Military Council, a coalition of rebels in opposition to Assad's regime. In September 2013, a number of Salafi jihadist and other Sunni Islamic fundamentalist groups left the Supreme Military Council to form the Islamic Coalition. Around the same time, ISIS began making gains in Syria from their strongholds in Iraq.

It was against this complex backdrop that the FBI began their

[1] At that time, the Free Syrian Army was a member of the Syrian National Coalition, the - representative of the Syrian people recognized by the United States government. *See* Press Release, U.S. Dept. of State, *Remarks to the Friends of the Syrian People* (Dec. 12, 2012), https://goo.gl/QmjOc2 (archived Apr. 13, 2015).

investigation of Mr. Smith. The FBI used an undercover source who was asked "to play a role that's… not their true self to help us get to the truth of a matter in an investigation." JA 493. The undercover contractor was assigned the persona of "Abu Khalid," who pretended to be an ISIS recruiter. JA 495, 653, 660. All of the meetings between Mr. Smith and "Khalid" were in Arabic, were recorded, and were shared with the jury during their deliberations. Only excerpts were played during the trial.

Over the course of a year, playing his role as an ISIS recruiter, "Khalid" told Smith that "he was helping brothers go to Syria to join ISIS." JA 507. On multiple occasions "Khalid" expounded on the glories of joining ISIS and asked Mr. Smith to send him the names of other Muslims who wanted to fight in Syria. JA 728, 739. Mr. Smith gave him no names. *Id.*

In an initial meeting on August 7, 2014, Mr. Smith explained to Abu Khalid that he wanted to go to Syria to help defend Wael Kodaimati's family. JA 504, 505. Soon after, "Khalid" introduced Smith to another FBI contractor using the pseudonym "Bilal." JA 507, 509. "Bilal" was playing the role of someone Mr. Smith could work with to obtain money in order to travel to Syria. JA 509. Mr. Smith worked side by side with "Bilal" for several months rebuilding cars and undertaking construction jobs. "Bilal" did not testify at trial.

During the course of their conversations, Mr. Smith indicated he was able to obtain a "buddy pass" from his girlfriend, which allows standby travel for friends and family members of employees of commercial airlines. JA 515, 700. Four months later, "Khalid" asked Mr. Smith to obtain a "buddy pass" for "Mohamed Hilal," described as a computer genius and a "brother that we need a lot…." JA 520, 765. "Khalid" did not say "Mohamed Hilal" was going to Syria nor did he mention ISIS directly. JA 564. "Khalid" gave Mr. Smith Mohamed Hilal's "name," a false date of birth and $80 cash for the buddy pass. JA 523. Critically, "Mohamed Hilal" was not an actual person; thus, so no one ever used the buddy pass. JA 566, 715.

Ultimately, on April 11, 2015, Mr. Smith broke off all communication with "Khalid." The final text explained, "I can't have anything to do with this. All I wanted was to go visit my friends to make sure he and his family was okay. You then started asking me to do things I had no intention of doing. I can't have anything to do with this period." JA 717.

2. The FBI knows Mr. Smith took no steps to travel to Syria or join ISIS. Mr. Smith did not travel to Syria; Mr. Smith provided no assistance for any actual persons to travel to Syria; Mr. Smith did not join ISIS; Mr. Smith did not recruit any members to ISIS.

Mr. Smith's passport expired in April of 2015, the same month he told-off "Khalid." JA 492, 548. He made no attempt to renew it. JA 492, 548.

3. FBI agents question Mr. Smith about the agency-created fictional scheme. After a year passed without contact or activity by Mr. Smith, the U.S. Attorney's Office issued a subpoena to his girlfriend to testify on February 16, 2016, before the grand jury about the buddy pass. JA 536. Mr. Smith immediately contacted the FBI and offered to come to its office that afternoon and explain the circumstances surrounding the buddy pass. JA 537.

In a formal recorded interview, Agent Godfrey—armed with knowledge of Smith's communications with "Abu Khalid"—interrogated Smith. Many of these questions involved whether or not Mr. Smith had expressed any plans to go to Syria. JA 799. As described by Agent Godfrey in his trial testimony, Mr. Smith "said that he, you know, had maybe talked about Syria and wanted to help the folks there and that kind of thing, but that he had never discussed going there and doing anything or helping any one particular group." JA 803.

4. Mr. Smith's trial. On June 21, 2017, Mr. Smith was charged with two counts of making a materially false statement to a federal agent in violation of 18 U.S.C. § 1001(a)(2).[2] Count One charged Mr. Smith with "falsely stating to FBI Special Agents then investigating a matter involving international terrorism that he had never discussed his desire or plans to travel to Syria." J.A. 20. The indictment alleged "this statement was false, because as Smith knew there and then, he had discussed his desire and plans to travel to Syria" with "Abu Khalid"

A trial was held on March 19-21, 2019. "Abu Khalid" testified at trial without revealing his actual name. The jury returned a guilty verdict on both counts. JA 1016-1017. The court imposed a sentence of two concurrent 60 months terms of imprisonment with three years supervised release. JA 1228-1234. Mr. Smith filed a timely Notice of Appeal on August 12, 2020. JA 1235.

5. The Court of Appeals Decision. On Appeal Mr. Smith argued that (1) the two counts of the indictment were multiplicitous, (2) Mr. Smith's statements to the FBI were not Material, False, or Knowingly Made, (3) the trail court should have given an entrapment instruction, and (4) the terrorism enhancement should not have been applied because there was no proof Mr. Smith 'intended to promote' a federal crime of terrorism.

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[2] Count Two involved the "buddy pass." Smith moved to dismiss Count Two as multiplicitous, but the district court denied his motion. That Count was ultimately dismissed by the Fourth Circuit.

A divided Fourth Circuit panel agreed that the two counts of the indictment were multiplicitous, vacated the judgment, and ordered the case remanded for resentencing. App. 2a to 41a

In their opinion, the Court examined both counts for sufficiency of the evidence.[3] The panel was united in deciding that Mr. Smith's statements to the FBI were material, false, and knowingly made, noting that "Godfrey explained that he asked the Hilal-related questions because the FBI needed to establish 'a baseline of truth' with Smith for additional questioning on the buddy pass." App. 24a. The Court concluded "that Smith's answers—though revealing only his untruthfulness—could alter the FBI's decision-making." App. 27a. This was true, the Court opined, even though "the agency fabricated the facts underlying his false statements" App. 27a, n.6.

The panel rejected Mr. Smith's argument that he was entitled to an entrapment instruction[4] and declined to address the terrorism enhancement, holding "On remand, the district court can address the merits of Smith's claim regarding the terrorism enhancement." App. 41a

[3] The Court "reverse[d] the district court's denial of Smith's motion to dismiss Count Two," App. 14a, but then examined Mr. Smith's challenge to the sufficiency of the evidence on both counts. App. 15a. Only Count One remains for consideration before this Court.

[4] Judge Heytens wrote a separate concurrence suggesting that future cases could lead to a valid entrapment defense under a different theory. App. 34a to 37a, quoting *Brogan v. United States*, 522 U.S. 398, 409-416 (1998) (Ginsburg, J., concurring in the judgment).

REASONS FOR GRANTING THE PETITION

Congress initially created 18 U.S.C. §1001 to ferret out and deter individuals from making false statements on regulatory reports. Although courts have generally permitted a broad application of the statute to a variety of false statements, in recent years federal law enforcement has increasingly misused §1001 to *create* crimes after an investigation uncovers no criminal conduct. Whether §1001 applies to statements made to FBI agents in the course of the agents' own fictional criminal enterprise is an important federal question. This Court should grant certiorari because the Fourth Circuit decided that important question in a way that conflicts with decisions of this Court and with the decision of the Third Circuit on the same matter. Sup. Ct. Rule 10(a) and (c).

In *Brogan v. United States*, Justice Ginsburg described the dangers of 18 U.S.C. §1001: "an overzealous prosecutor or investigator -- aware that a person has committed some suspicious acts, but unable to make a criminal case -- will create a crime by surprising the suspect, asking about those acts, and receiving a false denial." 522 U.S. at 416 (Ginsburg, J., concurring in the judgment). At oral argument in *Brogan,* the Solicitor General had forthrightly admitted to this Court that §1001 could even be used to "escalate completely innocent conduct into a felony." *Id.,* at 411. The case at bar demonstrates the danger of this power in a government "sting" where investigators create the entire fictional universe in which the defendant's statements are made.

Over the last 25 years, government investigative techniques have become more aggressive. Ginsburg's overzealous investigator has new, more powerful tools in his arsenal. Rather than waiting on the person to commit criminal acts, today's investigator can enlist contractors as actors to play the role of the bad guys and encourage the subject of the "investigation" to commit criminal acts. If the person still declines to join the criminal enterprise, the investigator can resort to creating a crime by simply asking the person about the operation. And because the investigator made up all the facts and characters involved, the government is ready to pounce and prosecute as soon as the person makes one misstatement. This is what happened to Mr. Smith.

Where the agencies were once concerned with investigating and apprehending individuals who had already committed or were actually planning to commit crimes, these same agencies now concentrate resources on locating and investigating those who they believe are inclined to commit offenses, especially terrorism-related offenses, even if there is no probable cause to believe they have violated the law. These investigations involve government contractors posing as terrorism recruiters and contacting a citizen offering to facilitate the commission of criminal offenses. The Federal Bureau of Investigation becomes the Bureau of Precognition.

Even if the citizen declines to engage in criminal behavior, the Fourth Circuit has held that he can still be convicted under 18 U.S.C. §1001 for lying to federal law enforcement about the fictional operation wholly created by the investigators and their contractors. In this case, the government create the entire criminal operation out of whole cloth. Government agents wrote the role of an ISIS recruiter and hired a long-term undercover source to play the part of "Abu Khalid." The agents needed a way for Mr. Smith, who did not have financial means, to raise money to travel to Syria, so they wrote the part of "Bilal" for another contractor to play. Mr. Smith was the only person involved in this matter who was not a character created by the FBI.

The government accused Mr. Smith of violating the statute for making a false statement, specifically, "falsely stating to FBI Special Agents then investigating a matter involving international terrorism that he had never discussed his desire or plans to travel to Syria."[5] *See* Bill of Indictment at ¶

[5] The "matter involving international terrorism" identified in Count One was an FBI investigation and sting operation, which failed to yield charges under any terrorism statute.

22 (JA at 20). The government alleged that Mr. Smith discussed plans to travel to Syria to support terrorism with the FBI's confidential human source. *Id.* In reality, the FBI contractor "Abu Khalid" was playing the role of a recruiter for ISIS and it was "Abu Khalid" who unilaterally voiced the support of ISIS.

There are several questions from the FBI interview that the government alleges implicate the allegations of Count One.[6] Agent Godfrey, during his two-hour interview of Mr. Smith, asked, "Did you ever talk to 'Abu Khalid' about possibly going over to Syria?" S.J.A. 81 at 1:56. This statement was actually true because Mr. Smith never spoke to "Abu Khalid," but, instead, spoke to a contractor playing the role of a fictional character named "Abu Khalid." When Mr. Smith answered "No" to this imprecise question, he may have actually been saying that he had not talked to "Abu Khalid" about "Abu Khalid" going to Syria or that he had not talked to "Abu Khalid" about going to Syria *with* "Abu Khalid". He could have even been saying "I never talked to 'Abu Khalid' about possibly going to Syria but I did talk to 'Khalid' about definitely going over to Syria."

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[6] The second count involved the intention of the totally fictional character "Mohammed Hilal" to use the buddy pass procured by Mr. Smith. Mr. Smith truthfully denied knowing Hilal's intentions because those intentions never existed. Count Two was dismissed by the Court of Appeals as multiplicitous.

Agent Godfrey also asked, "[H]ave you ever talked with anyone that you expressed to someone that you wanted to go to Syria and fight?" J.A. 797. This question is phrased in such a way that it inquires whether Smith talked with any person ("anyone") on the subject of "express[ing] to someone" (a third person) that he "wanted to go to Syria and fight." Smith answered, "No, I've told them that I wished there was something I could do for people, but I never had any plans to go there and do anything." *Id.* (ellipses omitted).

Finally, Agent Godfrey asked "Okay. I mean, we talked about -- I mean, have you ever talked with anyone that you wanted to go to Syria and join ISIS?" J.A. 798. Smith responded, "No, we've talked – I talk to numerous – you have to understand the Muslim community. There's so much stuff going on now in the Muslim community with everything." J.A. 798.

Despite the fact that these questions were ambiguous, and these answers were non-responsive, evasive and non-material, Mr. Smith was still convicted under 18 U.S.C. §1001. The Fourth Circuit upheld the conviction, declining to follow other courts that have developed different doctrines to avoid the inherent unfairness of a conviction where the investigative function of §1001 is no longer applicable.

It is imperative that this Supreme Court review Mr. Smith's conviction for a non-investigative use of 18 U.S.C. §1001 and develop a coherent doctrine to check the currently unrestrained use of government power to create a fictional criminal situation and convict unfortunate individuals who do not correctly describe the plot of the play that the investigators have written -- correctly reciting the fiction the government has created.

Ultimately the government should not be able to create a fictional situation for their own prosecutorial benefit. Mr. Smith denied the desire to undertake criminal behavior without actually having taken any step toward a criminal action. None of the people in this case are actually who they claim to be. Under this scenario, if the person does not recite the fictional situation to the government, then they are guilty of a crime. This gives the government an unfair second bite at the apple if the investigated individual declines to actually commit the crime.

1. **False Statements regarding a fictional world created by the investigating agency cannot be material because they cannot influence the investigating agency.**

In *Brogan*, Justice Ginsburg suggested that this potential government abuse of §1001 could be cured by relying on materiality, a safeguard that the Fourth Circuit refused to embrace in this case.

The requirement of materiality in 18 U.S.C. § 1001 is derived from the traditional elements of perjury. In the context of perjury, this Court noted Blackstone's concern that a false statement "also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is not penal." *Kungys v. United States*, 485 U.S. 759, 769 (1988) quoting 4 WILLIAM BLACKSTONE, Commentaries, at 137. "The most common formulation of that understanding is that a concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.*, 485 U.S. at 770 (internal quotations removed). Like the statute at issue in *Kungys*, materiality is also required for conviction under § 1001. *Id.*, 485 U.S. at 769.

However, the allegedly untruthful response regarding Mr. Smith's "travel plans" had no possibility of influencing the actions of the FBI. Rather than taking place during the heart of the Bureau's investigation, the interview was a "Hail Mary" at the very end of their inquiry. Paid FBI contractors "Abu Khalid" and "Bilal" had been instigating, probing, and scrutinizing Mr. Smith for more than 18 months. "Bilal" had been working with Mr. Smith on a near daily basis for 18 months. Agent Godfrey had been told that Mr. Smith did not have the money to travel to Syria, that he consistently failed to take any concrete steps to bring any aspirations of travel to fruition, and that his passport had expired.

The three reported questions asked of Mr. Smith during the FBI Interview involve whether he (1) talked to "Abu Khalid" about possibly going over to Syria, (2) talked with anyone that you expressed to someone that you wanted to go to Syria and fight, and (3) talked with anyone that you wanted to go to Syria and join ISIS.

The circuits agree that a false statement's capacity to influence the listener and its materiality must be established at the point in time that the statement was uttered. *United States v. Stone*, 429 F.2d 138 (2nd Cir. 1970); United States v. *Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998); *United States v. Holley*, 942 F.2d 916, 923 (5th Cir. 1991); *United States v Black*, 742 F.2d 1457 (6th Cir. 1984).

At the time they interviewed Mr. Smith, the investigators already had recordings of Mr. Smith's discussions and extensive reports from their contractors. Additionally, Mr. Smith's passport had expired, and he had disavowed "Abu Khalid's" recruitment attempts. Even if the statement he made in the interview was factually incorrect, the Bureau already knew. In fact, Agent Godfrey could only come up with one reason why the questions were needed: to "establish a baseline of truth." JA 801, 802, 808, 811, 814. But the fact that the defendant was untruthful does not, by itself, meet the materiality standard. *Kungys*, 485 U.S. at 776. As this Court explained "what is relevant [for materiality] is what would have ensued from official knowledge of the misrepresented fact . . . not what would have ensued from official knowledge of inconsistency between a posited assertion of truth and an earlier assertion of falsehood." *Id.*

While this Court has confirmed that the test for materiality does not turn on whether the false statements were believed by the party to whom they were made, *Brogan*, 522 U.S. at 402, there was no testimony whatsoever in this case that Mr. Smith's statement influenced or could have influenced the actions of the federal government in any way. After fruitlessly spending significant costs and resources, the Bureau had already completely shifted its exploration from Mr. Smith's travel plans to the potential use of "buddy passes." Because there was no evidence that the statements by Mr. Smith impacted or could have impacted the federal response, no reasonable fact finder could consider any false statement regarding Mr. Smith's discussion of his travel plans to be material.

The key to the statements' immateriality is the complete knowledge and control held by the government over the subject of the statements. All of the conversations with "Abu Khalid" were recorded and the agent had listened to those conversations. The materiality of a false statement must turn on the potential results derived from official knowledge of the misrepresented fact. Because the government had actually created all of the allegedly misrepresented facts, they could not be influenced by these statements and no possible result could have been derived from official knowledge of the misrepresented fact. The best potential bright-line rule would be to hold that a statement about an agent's own fictional world is not material.

2. The Fourth Circuit ignored this Court and the Third Circuit's holdings that non-responsive or literally true statements about a fictional world cannot support a conviction under §1001.

This Court recognized a "literal truth defense" in *Bronston v. United States*, 409 U.S. 352 (1973), holding "that an individual isn't guilty of perjury when his allegedly false answer was "literally true but not responsive to the question asked and arguably misleading by negative implication." *Id*., 409 U.S. at 353.

Ambiguity must be construed against the government investigators. "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id*. at 360. This Court recognized that the law "does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true." *Id*. at 357-58. Where the witness is unresponsive, "the examiner's awareness of unresponsiveness should lead him to press another question or reframe his initial question with greater precision." *Id*. at 362. It is an axiom that "[p]recise questioning is imperative as a predicate for the offense of perjury." *Id*. The Fourth Circuit admits that "There's no doubt Godfrey could have chosen his words more carefully," App. 17a, yet it refused to apply *Bronston*.

The Supreme Court held that conviction cannot be upheld where a statement is literally true but not responsive to the question asked and arguably misleading by negative implication," *Id*., 409 U.S. at 353. This Court places the burden on the questioner to ensure a responsive answer to a question framed with greater precision.

Relying upon *United States v. Sarwari*, 669 F.3d 401, 406 (4th Cir. 2012), the Fourth Circuit has created an exception to *Bronston*. It held that that the "literal truth" defense does not "apply to an answer that would be true on one construction of an arguably ambiguous question but false on another." App. 17a, *quoting Sarwar*i, 669 F.3d at 406. The Fourth Circuits exception to *Bronston* reverses the burden, requiring *the individual* to resolve the responsiveness of his answer and the meaning of an ambiguous question.

Using this formulated exception, the Fourth Circuit panel determined the questions ("[H]ave you ever talked with anyone that you expressed to someone that you wanted to go to Syria and fight?" and "I mean, we talked about -- I mean, have you ever talked with anyone that you wanted to go to Syria and join ISIS?") were sufficiently precise to support a conviction under 18 U.S.C. §1001. Yet these questions have numerous potential meanings, missing or assumed words and phrases, and could lead to various interpretations. *See supra 13-14.* Potential interpretations of these questions would render the answers non-responsive or literally true.

And Mr. Smith's answers to these questions are likewise problematic, because of an initial negative response followed by a non-responsive statement—the exact circumstances that this Court found fell within the "literal truth defense" in *Bronston*.

The Fourth Circuit split from Third Circuit precedent, which applies a literal truth defense to a fictional situation created by investigators. *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013). Courts have recognized that "when a statement is literally true, it is, by definition, not false and cannot be treated as such under a perjury-type statute, no matter what the defendant's subjective state of mind might have been." *Castro*, 704 F.3d at 139. In fact, "the government must be able to show that [the Defendant] made a statement to government agents that was untrue, and the government cannot satisfy that burden by showing that the defendant intended to deceive, if in fact he told the literal truth." *Id*. (emphasis added).

In the Third Circuit case, Daniel Castro, a high-ranking official in the Philadelphia Police Department, invested his life savings in residential real estate development project organized by an acquaintance named Wilson Encarnacion. *Id.*, at 125. Castro arranged for Rony Moshe, who was an FBI informant to engage a tough "debt collector" to pressure Encarnacion to repay Castro's losses in the project. An undercover FBI agent posing as the collector told Castro that he had extorted money from Encarnacion to give to Castro. The money came from the FBI and there was no evidence that Encarnacion was aware of the FBI's payments to Castro or that the FBI's payments somehow reflected a debt actually owed by Encarnacion.

At an interview by FBI agents, "Castro claimed that he had not discussed with anyone the collection of a debt from Encarnacion, that he did not hire anyone to extort money from Encarnacion, and that he had not received any money from Encarnacion." *Id.*, at 130-32.

Castro was convicted of making a false statement to federal law enforcement officers in connection with his efforts to collect money from Encarnacion in violation of 18 U.S.C. §1001. On appeal, Castro argued that, in fact, he "had not received any such repayments" from Encarnacion but had instead received money from the FBI in a sting operation. Thus, he claimed that his denial "was not 'false,' much less 'knowingly' so." He reasoned that since his denial was literally true, even if he did not appreciate it as such, "the evidence was insufficient to convict…" *Id.* at 134 (citations omitted).

The Court agreed. As it explained,

> There is, quite literally, no evidence whatsoever that even a penny of the money that Moshe handed over to Castro came from Encarnacion. To say, as the government does, that "[t]he FBI actually gave Castro $21,000 on Encarnacion's behalf," is an invention, since nothing shows that Encarnacion owed Castro anything, much less that he authorized the government to pay Castro on his behalf. Castro is therefore not guilty…. because the statement set forth in that count simply was not false.

Id., at 140-41.

The Fourth Circuit declined to apply *Castro* because "the falsity of Smith's statements turns on his state of mind." App. 24a. However, this is the exact opposite of the holding of *Castro*: "[W]hen a statement is literally true, it is, by definition, not false and cannot be treated as such under a perjury-type statute, *no matter what the defendant's subjective state of mind might have bee*n." *Castro*, 704 F.3d at 139 (emphasis added).

Where a statement is literally true because the person and the situation doesn't not actually exist (e.g., a government-created lie in a sting operation), all circuit courts should apply the rule adopted in *Bronston* and applied in *Castro*. The Fourth Circuit ignored that bright-line rule and has provided precedent to foster further government abuse.

3. The history of §1001 does not support its application to a government-created scheme.

A version of this false statement statute was first enacted during the Civil War as part of the prohibition against filing fraudulent claims with the government and, at that time, its application was limited to such filings. *See* Act of Mar. 2, 1863, Ch. 67, 12 Stat. 696-697. At the end of World War One, the prohibition was expanded to cover other false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States." Act of Oct. 23, 1918, Ch. 194, § 35, 40 Stat. 1015-1016. The false claims statute, however, applied only to false statements "relating to the fraudulent causing of pecuniary or property loss." *United States v Gilliland*, 312 U.S. 86, 92 (1941) (quoting *United States v Cohn*, 270 US 339, 346-47 (1926)).

During the expansion of the New Deal in 1934, the Secretary of the Interior requested that Congress amend the false claims statute to deter false statements on regulatory reports. *See Gilliland*, 312 U.S. at 94. In response, Congress enacted the statute now codified as §1001, which greatly expanded the scope of the criminal prohibition on false statements. *Id.* at 94-95.

Although the statute was designed to solve the problem of false statements by people required to report to a federal agency, §1001's language makes no distinction between required and voluntary responses. Accordingly, this Court has read §1001 expansively, holding that the statute applies to verbal as well as written reports, *United States v Beacon Brass Co*., Inc., 344 US 43, 46 (1952), to non-regulatory action, *United States v Bramblett*, 348 US 503, 509 (1955), to investigative agencies, *United States v Rodgers*, 466 US 475, 477 (1984),[7] and to situations where there is no legal obligation to speak, *Bryson v United States*, 396 US 64, 71 (1969).

In the 1950s, prosecutors began to exercise the extraordinary breadth of §1001 against suspects who lied to investigators. This new application gives an enormous and unprecedented power to the federal police, leading to serious problems and potential abuses. Punishing people for lying in response to incriminating questions gives powerful impetus to "inquisition as a method of criminal investigation." *United States v Bush*, 503 F2d 813, 815 (5th Cir 1974). Although lying to the police is obviously objectionable, police authority does not traditionally include the power to punish suspects who lie, unlike the power to prosecute perjury for false statements made

[7] "The statutory language clearly encompasses criminal investigations conducted by the FBI and the Secret Service, and nothing in the legislative history indicates that Congress intended a more restricted reach for the statute."

under oath.

This Court has held that the false statement must be material, (*see, e.g.*, *Kungys*, 485 U.S. 759), and that materiality must be determined by the jury. *United States v. Gaudin*, 515 U.S. 506 (1995). This Court further determined that the plain language of the statute admitted of no exception for an "exculpatory no," that is that the witness could remain silent to avoid an admission to a crime but could not respond falsely. *Brogan*, 522 U.S. 398.

The legitimacy of §1001 is centered on its investigative purpose. The statute exists to help government agencies truthfully investigate and truthfully obtain information. If the false statement is volunteered to an FBI agent, the Supreme Court has held that §1001 applies. *United States v. Rodgers*, 466 U.S. 475 (1984). In this context, the purpose of the statute is to aid the government in making investigative decisions based on this truthful information. It makes it a crime when a person knows and reasonably believes that the agency will rely on their assertations. Traditionally, the use of §1001 is confined to this investigative purpose.

Recently, the use of §1001 is particularly common in the investigation of terrorism suspects. According to the "trial and terror" database published by The Intercept,[8] 18 USC §1001 is the fourth most common charge prosecuted by the Justice Department against terrorism defendants, with 157 cases[9] nationally since 2001. Twenty-eight (about 17%) of those cases, including the case at bar, involved sting operations.

However, the use of §1001 is extremely problematic in situations where the investigators have invented the entire criminal operation. In these "sting" cases, the investigators have lied to create the "facts" of the undercover sting. The law does not hold agents or their operatives liable for the lies they tell to suspects or defendants. Lies told while undercover have been almost uniformly found to be constitutional under the Fourth Amendment under the "third-party doctrine." See, e.g., *Lewis v. United States*, 385 U.S. 206, 206–07 (1966). In fact, the limits on the use of lies by investigators while undercover prior to indictment are only constrained by the entrapment defense and the Due Process Clause of the Fifth Amendment. When these investigator-created false realities are the subject of questions

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[8] *See Trial and Terror*, THE INTERCEPT, (https://trial-and-terror.theintercept.com) (last updated Nov. 14, 2022). Of the 982 terrorism defendants prosecuted by the U.S. Department of Justice since 2001, 643 defendants have pleaded guilty to charges, while the courts found 206 guilty at trial. Just 3 have been acquitted and 4 have seen their charges dropped or dismissed.

[9] Of those charged with making false statements, 99 pled guilty, 41 were found guilty, 13 remain fugitives, 2 are awaiting trial, and 2 had their charges dropped.

and allegedly false responses made to those very investigators, the statute fails to meet any investigative purpose and its application as a criminal sanction loses legitimacy.

4. **Although entrapment has not historically applied to §1001, the FBI's use of sting operations requires a reevaluation.**

The entrapment defense requires that the government induce the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. *Mathews v. United States*, 485 U.S. 58, 63 (1988). Because the actual criminal conduct in the case at bar and other §1001 cases is lying to the FBI, "Abu Khalid's" role in encouraging him to join ISIS or travel to Syria and Mr. Smith negative predisposition would usually be considered irrelevant.

However, in his concurrence to the Fourth Circuit opinion, Judge Heytens suggested that government overreach may not be countenanced in future cases because of a potential entrapment defense. App. 34a. Judge Heytens relied upon Justice Ginsburg's concurrence in *Brogan*, where she noted §1001 "arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt." *Brogan*, 522 U.S. at 409 (Ginsburg, J., concurring in the judgment). As discussed *supra*, Justice Ginsburg described a likely situation where "an investigator finds it difficult to prove some elements of a crime, she can ask questions about other elements to which she already knows the answers." *Id.*, 522 U.S. at 411 (Ginsburg, J. concurring in the judgment). Then, Justice Ginsburg continues, "If the suspect lies, she can then use the crime she has prompted as leverage or can seek prosecution for the lie as a substitute for the crime she cannot prove." *Id.*

In using undercover agents, this Court has suggested that the government "may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Jacobson v. United States*, 503 U.S. 540, 548 (1992). Judge Heytens was concerned that because

> one government agent (an undisclosed confidential informant) raise[s] the topic of ISIS and u*rge[s] Smith not to disclose those conversations* to anyone, and then having another set of government agents (the FBI) *ask Smith about those very same conversations*, the government originated a criminal design and implanted in an innocent person's mind the disposition to commit a criminal act.

App. 36a, *citing Jacobson*, 503 U.S. at 548 (internal quotations omitted) (emphasis added).

5. A similar bright-line rule prevents a defendant from conspiring or aiding or abetting a government agent.

Convicting a person of making a false statement to FBI agents where the agents invented the facts on which the statement was based is akin to convicting a person of conspiracy where the alleged co-conspirator is a government agent. Of course, it is well settled that government agents participating in 'sting' operations are not part of the conspiracy. *Rogers v. United States*, 340 U.S. 367, 375 (1951); *Morrison v. California*, 291 U.S. 82, 92 (1934); *United States v. Giry*, 818 F.2d 120, 125 (1st Cir. 1987); *United States v. Barnes*, 604 F.2d 121, 161 (2d Cir. 1979); *United States v. Chase*, 372 F.2d 453, 459 (4th Cir. 1967) *cert. denied* 387 U.S. 907, (1967); *United States v. Strickland*, 245 F.3d 368, 386 (4th Cir. 2001); *Sears v. United States*, 343 F.2d 139 (5th Cir. 1965); *United States v. Manotas-Mejia*, 824 F.2d 360, 364-65 (5th Cir. 1987); *United States v. Pennell*, 737 F.2d 521, 536 (6th Cir. 1984); *United States v. Barger*, 931 F.2d 359, 369 (6th Cir. 1991); *O'Brien v. United States*, 51 F.2d 674 (7th Cir. 1931); *United States v. Escobar de Bright*, 742 F.2d 1196, 1199-1200 (9th Cir. 1984); *United States v. Dimeck*, 24 F.3d 1239, 1242 n.6 (10th Cir. 1994); *United States v. Vasquez*, 874 F.2d 1515, 1516-17 (11th Cir. 1989). Therefore, even if a defendant knowingly and willfully agreed to engage in an illegal act, he cannot be convicted of conspiracy without the agreement of a non-agent.

Similarly, a person cannot be convicted of aiding and abetting a fictitious crime created by government agents. *See United States v.*

Hornaday, 392 F.3d 1306, 1314 (11th Cir. 2004); *Haynes v. United States*, 319 F.2d 620 (5th Cir. 1963); *United States v. Meinster*, 619 F.2d 1041 (4th Cir. 1980); *United States v. Gould*, 419 F.2d 825 (9th Cir. 1969). Some laws require more than *mens rea* to complete the crime. Just as it would be a legal impossibility for Mr. Smith to conspire with "Abu Khalid" or to aid and abet "Abu Khalid" or "Mohammed Hillel," so too is it impossible for a false statement about facts invented by FBI agents to have a natural tendency to influence those agents.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED THIS the 1st day of March, 2023.

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APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4414

UNITED STATES OF AMERICA,

Plaintiff − Appellee,

v.

ALEXANDER SAMUEL SMITH, a/k/a Amir Alexander,

Defendant – Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Max O. Cogburn, Jr., District Judge. (3:17−cr−00182−MOC−DSC−1)

Argued: March 11, 2022 Decided: December 1, 2022

Before GREGORY, Chief Judge, and DIAZ and HEYTENS, Circuit Judges.

Affirmed in part, reversed in part, judgment vacated, and case remanded for resentencing by published per curiam opinion, in which Chief Judge Gregory and Judge Heytens joined in full. Judge Diaz joined the per curiam opinion in part. Judge Heytens wrote a concurring opinion. Judge Diaz wrote an opinion dissenting in part.

ARGUED: James Walter Kilbourne, Jr., ALLEN STAHL & KILBOURNE, PLLC, Asheville, North Carolina; Allie Jordan Hallmark, HAMILTON WINGO LLP, Dallas, Texas, for Appellant. Amy Elizabeth Ray, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee. **ON BRIEF:** Charles D. Swift, CONSTITUTIONAL LAW CENTER FOR MUSLIMS IN AMERICA, Richardson, Texas, for Appellant. William T. Stetzer, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

PER CURIAM:

A jury convicted Alexander Samuel Smith on two counts of lying to the FBI, violating 18 U.S.C. § 1001(a)(2). The district court sentenced him to concurrent 60-month prison terms. On appeal, Smith challenges (1) the district court's denial of his motion to dismiss Count Two of his indictment as multiplicitous, (2) the sufficiency of the evidence supporting the jury's verdict, (3) the district court's allegedly prejudicial statements to the jury, (4) the district court's refusal to give an entrapment instruction, and (5) the district court's application of a terrorism enhancement at sentencing.

As explained below, we reverse the district court's denial of the motion to dismiss Count Two, vacate the judgment, and remand for resentencing. We otherwise affirm.

I.

A.

Acting on an informant's tip, the FBI began investigating Smith in the summer of 2014. Smith had asked the informant for help in traveling to Syria to participate in its civil war. As far as the investigating agents knew, Smith wanted to join the armed conflict between Syria's government and various factional forces, including the Islamic State of Iraq and Syria ("ISIS").[1] ISIS had recently solicited Westerners to join its fight.

Agents soon learned of a connection between Smith and the Kodaimatis—a father and son who were already under federal investigation for supporting ISIS. Smith once

[1] The United States had long designated ISIS a terrorist organization.

worked for the Kodaimatis and traveled to Syria with them in 2006. Based on that connection and the informant's tip, agents became concerned that Smith was considering joining ISIS in Syria. So agents had the informant refer Smith to a second informant, Abu Khalid. Khalid would act as an ISIS recruiter who could facilitate Smith's travel plans.

Smith contacted Khalid and scheduled an in-person meeting for August 2014. At the meeting, Smith told Khalid that he wanted to return to Syria to help defend a family whom he had once visited. Smith explained that the family lived near a city divided between three warring groups, including ISIS.

Khalid responded that he was helping "brothers" go to Syria to join ISIS. S.J.A. 2.[2] He asked Smith whether he "wanted to be with" the "leader of ISIS." J.A. 665. Smith answered, in Arabic, "inshallah." J.A. 665. But if Smith wanted to join ISIS, Khalid said, he would have to pledge allegiance to the group's leader. Khalid explained that Smith would be "going to fight . . . under command of" ISIS, asking whether Smith would accept that. S.J.A. 8. Smith again responded in Arabic: "[n]a'am." S.J.A. 8. Khalid later testified that "inshallah" and "na'am" were affirmations.

For his part, Smith discussed his ability to fight, telling Khalid that he knew about hand-to-hand combat and weapons but lacked formal training. Before leaving, Smith mentioned that he had a passport and would be ready to travel in a few weeks. The pair made plans to talk again.

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[2] Citations to the "S.J.A." refer to the Supplemental Joint Appendix filed in this appeal.

Between August and November 2014, Smith and Khalid met three more times. In their second and third meetings, Smith reaffirmed his desire to travel to Syria. Khalid told Smith that he'd be "expected to kill for ISIS if he went to Syria," and Smith said it would be "no problem." J.A. 693.

Because Smith often mentioned that he didn't have the money to buy his airfare to Syria, Khalid introduced Smith to Bilal, a third informant, to help him earn money for the trip. Bilal worked with Smith on odd jobs, including construction projects and car restorations. In the fourth meeting with Khalid, Smith offered to obtain discount airfare (or, a "buddy pass") for Khalid should he ever need it. Smith's then-girlfriend worked in customer service for an airline and could buy such passes.

Smith and Khalid didn't meet again until March 2015. Khalid asked Smith if he'd be able to get a buddy pass for Mohamed Hilal, a fictitious person the FBI had invented. Khalid told Smith that Hilal was important to ISIS and planning to travel to Syria.

Using another person's credit card, Smith and his girlfriend bought Hilal the pass. But when the pass went unused, Smith emailed Khalid to ask what happened. Khalid responded that Hilal got confused and didn't use the pass. Smith then cut off all contact with Khalid, saying he couldn't "have anything to do with this." S.J.A. 80.

B.

In February 2016, the FBI coordinated with the U.S. Attorney's Office in the Western District of North Carolina to issue a grand jury subpoena for Smith's now-wife. After his wife received the subpoena, Smith called the FBI and spoke with Agent Ronald

Godfrey—one of the agents investigating him. Smith agreed to visit the FBI's office and "explain the circumstances about [the] buddy pass." J.A. 537.

Godfrey, armed with knowledge of Smith's communications with Khalid, interrogated Smith. Godfrey asked Smith whether he spoke with Khalid about "possibly going to Syria," and Smith replied, "no." S.J.A. 81 at 1:55:55–1:56:00.[3] Godfrey also asked, "[H]ave you ever talked with anyone that you expressed to someone that you wanted to go to Syria and fight?" J.A. 797. Smith answered, "No, I've told them that I wished there was something I could do for people, but I never had any plans to go there and do anything." J.A. 797. And Godfrey asked if Smith had ever "talked with anyone that [Smith] wanted to go to Syria and join ISIS." J.A. 798. Smith responded, "No, we've talked – I talk to numerous – you have to understand the Muslim community. There's so much stuff going on now in the Muslim community with everything." J.A. 798. Though Godfrey warned Smith that he could get in trouble for lying to the FBI, providing a copy of § 1001, Smith stood firm that he never had any plan or intent to go to Syria.

Godfrey's questioning then turned to Hilal. Godfrey asked Smith if he knew that Hilal "was planning to use the buddy pass" to travel to Syria and join ISIS. S.J.A. 81 at 2:04:55–2:05:20. Smith said that he didn't know "anything [Hilal] was planning to do" and that he "didn't know what [Hilal] had in his mind [or] what his plans were." S.J.A. 81 at 2:05:20–2:05:30.

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[3] S.J.A. 81 refers to a series of sequentially timestamped video exhibits on file with the Clerk of Court.

C.

A grand jury indicted Smith on two counts of making a materially false statement to a federal agent in violation of 18 U.S.C. § 1001(a)(2). Count One charged Smith with "falsely stating to FBI Special Agents then investigating a matter involving international terrorism that he had never discussed his desire or plans to travel to Syria." J.A. 20. Count Two charged him with telling the FBI "he did not know that [Hilal] intended to use the buddy pass procured by [Smith] to travel and support ISIS." J.A. 21. Smith moved to dismiss Count Two as multiplicitous, but the district court denied his motion.

The case proceeded to a jury trial. The government called four witnesses: Godfrey, Khalid, an expert on ISIS and other terrorist organizations, and an airline employee. The jury also heard recordings of Smith's conversations with Godfrey and Khalid.[4]

At the close of the government's case, Smith moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. Smith argued that the government hadn't shown that he knowingly and willfully made a false statement or that his statements were material to the FBI's investigation. The district court denied Smith's motion. Smith then recalled Godfrey before unsuccessfully renewing his Rule 29 motion at the close of all evidence.

Smith asked the district court to instruct the jury on an entrapment defense. He claimed the FBI had instigated him to commit his alleged crimes through the subpoena and

[4] Relevant on appeal, the court said in overruling a government objection during Godfrey's cross-examination, "we have two counts of a violation of 1001, which indicate that there were . . . two falsehoods here." J.A. 835.

other pressure tactics the agency employed on his wife. The court declined, reasoning that Smith hadn't shown that the FBI induced him to lie. The court did, however, instruct the jury on informants, explaining that "the government is lawfully permitted to use decoys and deception to conceal the identity of its informants." J.A. 982.

The jury returned a guilty verdict on both counts and found that each offense involved international terrorism.

D.

Smith's presentence investigation report first recommended a 63- to 78-month prison term, based on a total offense level of 26 and a criminal history category of I. But the government objected, arguing that U.S.S.G. § 3A1.4's terrorism enhancement should apply. The probation office agreed with the government, increasing Smith's total offense level to 32 and his criminal history category to VI. Smith's Guidelines sentence became 192 months' imprisonment—the statutory maximum.

The district court later overruled Smith's objection to the terrorism enhancement but varied downward, imposing two concurrent 60-month terms of imprisonment and three years' supervised release. The court certified that its sentence would be appropriate regardless of the terrorism enhancement.

This appeal followed.

II.

We begin with Smith's claim that the district court erred by declining to dismiss Count Two as multiplicitous. "The rule against multiplicity is rooted in the Double

Jeopardy Clause of the Fifth Amendment" and protects against "the imposition of cumulative punishments for the same offense in a single criminal trial." *United States v. Shrader*, 675 F.3d 300, 313 (4th Cir. 2012).

To determine whether convictions are multiplicitous, courts must first identify "[w]hat Congress has made the allowable unit of prosecution." *Id.* The controlling question is, thus, whether Congress intended the unit of prosecution under § 1001 to be a single statement. Such an interpretation would allow a defendant to be charged separately for each false statement made during a single interview. But, if "Congress fails to define the criminal unit or the legislative intent in this regard is ambiguous, any ambiguity should be resolved in favor of lenity." *United States v. Mason*, 611 F.2d 49, 51 (4th Cir. 1979) (citations omitted); *see also United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) ("Employing the canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor.").

Smith maintains that "both of the alleged false statements were made . . . in the same interview and comprise only one violation of 18 U.S.C. § 1001." Appellant's Br. at 38. The thrust of this argument is that § 1001(a)(2) criminalizes a course of conduct rather than an individual false statement. Because we find that Congress's intent concerning § 1001(a)(2)'s unit of prosecution is ambiguous, we must apply the rule of lenity and find Count Two multiplicitous.

A.

Section 1001(a)(2) prohibits "any materially false, fictitious, or fraudulent statement or representation." When previously confronted with similar statutory language, we have found Congress's intent ambiguous.

In *Mason*, we held that the language of 18 U.S.C. § 922(a)(6) punishing "any false or fictitious oral or written statement" was "ambiguous with respect to the unit of prosecution." *United States v. Mason*, 611 F.2d 49, 52 (4th Cir. 1979). Our decision in *Mason* involved the Gun Control Act and the defendants' charges included "knowingly making a false statement in connection with the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6)." *Id.* at 50–51. Both defendants submitted written forms when purchasing firearms and falsely denied having been previously convicted of a felony on each form. Because the defendants purchased multiple firearms, and submitted one form per firearm, they were charged with multiple counts under § 922(a)(6) based on each form. To determine whether these counts were multiplicitous, we looked to the Supreme Court's analysis in *United States v. Bell*. *Id.* at 51 (citing *United States v. Bell*, 349 U.S. 81 (1955)).

In *Bell*, the Supreme Court held that the language employed in the Mann Act—prohibiting the knowing transportation in "interstate or foreign commerce" of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose[,]"—was ambiguous. 349 U.S. at 82. The defendant in *Bell* transported two women simultaneously and in the same vehicle. Because the statutory language could be interpreted to support finding both that Congress intended the defendant to be charged once for each woman, or cumulatively charged once for both women, the Supreme Court found the statutory language ambiguous and applied the rule of lenity. Relying on *Bell*, we found that the statutory language in *Mason*, prohibiting "any false or fictitious oral or written statement" was also ambiguous as to the unit of prosecution. *Mason*, 611 F.2d at 52.

Despite the similar language at issue here, our dissenting colleague distinguishes *Mason* by arguing that the *Mason* Court also relied on the way in which the Gun Control Act was administered. *See* Dissenting Op. at 40. But *Mason*'s discussion of the Gun Control Act's administration merely provided additional support to its primary holding that the statutory language was ambiguous under *Bell*. Indeed, this Court introduced that discussion in *Mason* by stating, "[o]ur *conclusion* on this point is *buttressed* by the manner in which the Gun Control Act has been administered by the Bureau of Alcohol, Tobacco and Firearms." *Mason*, 611 F.2d at 52 (emphases added). Given its prior discussion of *Bell*, and the application of the rule of lenity to resolve doubt "against turning a single transaction into multiple offenses[,]" as well as its conclusion that the statutory language was ambiguous, the following discussion of the Act's administration only bolstered the Court's holding that it had already made clear. *Id.* at 51.

B.

Neither the legislative history, nor our case law following *Mason*, serve to clarify § 1001(a)(2)'s ambiguity. In 1996, Congress amended the statute to cover "any . . . statement or representation," 18 U.S.C. § 1001(a)(2) (1996)—in the singular—as opposed to its former version covering "any . . . statements or representations," 18 U.S.C. § 1001 (1948). This revision fails to explain Congress's intent regarding the unit of prosecution, because the terms "statement" and "representation" do not carry the same definition. *See*

Statement, Oxford English Dictionary (3d ed. 2012), https://www.oed.com/view/Entry/189259 (last visited November 28, 2022) (defining "statement" as "[a] formal written or oral account of facts, theories, opinions, events . . . as requested by authority"); *Representation*, Oxford English Dictionary (3d ed. 2009), https://www.oed.com/view/Entry/162997 (last visited November 28, 2022) (defining "representation" as "[t]he action of standing for, or in the place of, a person, group, or thing, and related senses" or "[a] depiction or portrayal of a person or thing").

Although a statement may be a representation, a representation is not necessarily a statement. Thus, there is no need to interpret the statute's terms as one referring to a single assertion, and the other to a series of assertions, in order to avoid rendering the statute's language superfluous. And while Congress's revision, amending § 1001(a)(2) to cover "any . . . statement or representation" in the singular, supports a finding that the statute is broad enough to encompass a single interview that only included one false statement, it does little to show that Congress *unambiguously* intended the unit of prosecution to be each individual statement made during one interview. Instead, the statute remains ambiguous because one could easily interpret § 1001(a)(2)'s unit of prosecution as one single interview or form. Under this view, the statute could be interpreted as characterizing Smith's entire interview as a "statement or representation," sufficient to support one count of making a false statement in violation of § 1001(a)(2).

In its attempt to declare § 1001(a)(2) unambiguous, the dissent relies upon an unpublished case decided after *Mason*. *See* Dissenting Op. at 38–39. In *Jameson*, we upheld the defendant's four convictions under § 1001(a)(2) and determined that "each nonidentical false statement made may be charged as a separate violation of section 1001." *See United States v. Jameson*, Nos. 91-5848, 91-5849, 91-5876, 1992 WL 180146, at *9 (4th Cir. July 29, 1992) (per curiam). The defendant's false statements there stemmed from two separate forms, one form submitted on September 15, 1987, and the second form submitted on September 7, 1988. On both forms, the defendant falsely denied (1) having any additional "creditors other than those providing conventional loans," and (2) possessing "interests in real property other than his personal residence." *Id.*

Declining to find his charges as multiplicitous, we reasoned that the questions on the two forms were not identical because they concerned the defendant's debt and property as of two different dates. We also found that the defendant could be charged with two counts per form because the government had to prove different facts for each count.[5] While Smith's challenge is more difficult to square with our unpublished decision in *Jameson*, the differing facts that the government had to prove to sustain each charge there render *Jameson* distinguishable from this case.

Unlike the differing types of documents that would be required to prove an individual's debt and specific property interests, the government proved Counts One and

[5] For support, we discussed the Supreme Court's decision in *United States v. Blockburger*, holding that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). The defendant in *Blockburger*, however, was charged under two "*distinct* statutory provisions" and "[e]ach of the offenses created requires proof of a different element." *Id.* at 304. Because the defendant's one sale violated two sections of the same act, the Court upheld the defendant's judgment. *Id.* at 304. *See United States v. Mier-Garces*, 976 F.3d 1003, 1012–13 (10th Cir. 2020) (explaining that the *Blockburger* test applies "[w]hen the government charges a defendant under *separate statutes* for the same conduct").

Two by solely relying on the communications between its informants and Smith. The government had to prove that Smith "discussed his desire and plans to travel to Syria in support of ISIS with The Source[,]" J.A. 20, under Count One, and that Smith "had discussed with The Source the travel plans of a person that he [SMITH] believed to be a person who wanted to travel and assist ISIS[,]" J.A. 21, under Count Two. Thus, the FBI's evidence for both counts depended on its informants' conversations with Smith. It is also worth noting that while some of our sister circuits have defined § 1001(a)(2)'s unit of prosecution as a single statement, none of them have done so in a case where the government's evidence was so similar in substance. *See United States v. Meuli*, 8 F.3d 1481, 1485–86 (10th Cir. 1993) (involving a defendant who made false statements on multiple forms); *United States v. Segall*, 833 F.2d 144, 146–48 (9th Cir. 1987) (affirming the defendant's conviction on three counts of making a false statements on two separate dates); *United States v. Guzman*, 781 F.2d 428, 432–33 (5th Cir. 1986) (affirming the defendant's conviction on two counts under § 1001 for falsely representing her name on two separate documents).

In sum, we find ambiguity in Congress's intended unit of prosecution in § 1001(a)(2) following *Mason*. Because nothing in our case law nor the relevant legislative history serves to clarify this ambiguity, we apply the rule of lenity and reverse the district court's denial of Smith's motion to dismiss Count Two. *See Santos*, 553 U.S. at 519 ("We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."); *see also Bell*, 349 U.S. at 81 ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.").

III.

We turn next to Smith's challenge to the sufficiency of the evidence. Smith claims that the district court erred in denying his motion for a judgment of acquittal on both false-statement counts. We disagree.

Rule 29 requires a trial court, on the defendant's motion, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). We review the district court's denial of a Rule 29 motion de novo. *United States v. Burfoot*, 899 F.3d 326, 334 (4th Cir. 2018). In doing so, "we view the evidence in the light most favorable to the prosecution and decide whether substantial evidence . . . supports the verdict." *United States v. Walker*, 32 F.4th 377, 397 (4th Cir. 2022) (cleaned up). "Substantial evidence" is evidence that a reasonable fact-finder could accept as adequate and sufficient to support a defendant's guilt beyond a reasonable doubt. *See id.* Defendants bear a "heavy burden" under this standard. *Id.* (cleaned up).

"A § 1001 false-statement conviction requires (1) a false statement in a matter involving a government agency, (2) made knowingly [and] willfully, that is (3) material to the matter within the agency's jurisdiction." *United States v. Legins*, 34 F.4th 304, 313 (4th Cir. 2022). Smith's challenge to his Count One conviction spans each element. On Count Two, he contests only falsity and materiality. We address each count in turn.

A.

On Count One, Smith contends that the government failed to prove he knowingly made a materially false statement. Count One charged him with "falsely stating to FBI

Special Agents . . . that he had never discussed his desire or plans to travel to Syria." J.A. 20.

Smith first claims we must vacate this conviction because his responses to the FBI's imprecise questions were truthful. He next argues that the government failed to prove that he acted with the requisite intent because no expert testified to the meaning of Smith's Arabic statements. And last, Smith contends that, even if he knowingly and willfully made false statements, those statements were immaterial to the FBI's near-completed investigation. We disagree, finding sufficient evidence supports the jury's verdict on Count One.

1.

Smith's challenge to falsity revolves around Godfrey's questions, which are reproduced in the indictment:

1. "[H]ave you ever talked with anyone about . . . that you expressed to someone that you want to go to Syria and fight?"

2. "[H]ave you ever . . . talked with anyone that you wanted to go to Syria and join ISIS?"

J.A. 18. According to the indictment, Smith's responses to these questions were false given his discussions with Khalid about traveling to Syria.

Smith insists he truthfully answered both questions in the negative. The first question, Smith says, is phrased so ambiguously that he interpreted it to ask whether he had talked with anyone about having expressed to anyone else that he wanted to go to Syria. And the second question is "similarly imprecise," Smith claims, because it asks "whether [he had] engaged in a conversation with a person, [whom he] thought should go to Syria and join ISIS." Appellant's Br. at 47.

Smith's contentions turn on the literal-truth defense set forth in *Bronston v. United States*, 409 U.S. 352 (1973). In *Bronston*, the Supreme Court held that an individual isn't guilty of perjury when his allegedly false answer was "literally true but not responsive to the question asked and arguably misleading by negative implication." 409 U.S. at 353.

Underlying this doctrine is the notion that "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id.* at 360. And if a response is evasive, it's the questioner's duty "to spot that evasion and to flush out the whole truth." *United States v. Earp*, 812 F.2d 917, 919 (4th Cir. 1987) (cleaned up). Though *Bronston* dealt with a perjury charge, we've since applied its holding to § 1001 offenses. *See United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003).

But as we've explained, the literal-truth defense is "a narrow one." *United States v. Sarwari*, 669 F.3d 401, 406 (4th Cir. 2012). "It applies only where a defendant's allegedly false statements were *undisputedly* literally true." *Id.* (cleaned up). And fatally for Smith, it doesn't "apply in cases in which the focus is on the ambiguity of the question asked. Nor does it apply to an answer that would be true on one construction of an arguably ambiguous question but false on another." *Id.* (cleaned up).

That Smith can construe either question as ambiguous therefore doesn't help him. There's no doubt Godfrey could have chosen his words more carefully. Still, Godfrey testified that he asked Smith "about whether or not [Smith] had expressed any plans or desire, intentions[,] or aspirations to go to Syria," which Smith denied. J.A. 799. A reasonable jury could conclude that (1) Godfrey intended to ask Smith about his discussion of his personal desire to travel to Syria, and (2) Smith understood as much. *See United States v. Purpera*, 844 F. App'x 614, 632 (4th Cir. 2021) (finding an investigator's testimony sufficient for a reasonable jury to resolve against the defendant an "ambiguity surrounding the precise nature of [the investigator's] question").

Thus, Smith's response to the second question is enough to support falsity. When Godfrey asked whether Smith had ever "talked with anyone that [he] wanted to go to Syria and join ISIS," Smith replied, "No, we've talked – I talk to numerous – you have to understand the Muslim community. There's so much stuff going on now in the Muslim community with everything." J.A. 798.

Smith answered Godfrey's second question with "[n]o." The rest of his response, even if true, doesn't retract his initial denial. A rational jury could thus find Smith falsely denied discussing his desire to travel to Syria.

Even so, Smith suggests that his answer to Godfrey's first question, under any construction, was either nonresponsive or true. While we need not reach this contention, we reject it all the same.

Smith says his response to the first question was literally true because he told Godfrey he "never had any *plans* to go [to Syria] and do anything." Appellant's Br. at 46 (cleaned up) (emphasis added). Smith contends that, when he said he had no "plans" to go to Syria, he meant he had no "detailed proposal" to go, rather than no "intention or decision" to do so. Appellant's Br. at 46 (quoting Oxford Dictionary of English (3d ed. 2010)). He argues that his intended definition of "plans" makes his response literally true.

Smith relies on our precedent in *United States v. Hairston*, 46 F.3d 361 (4th Cir. 1995). There, we reversed a perjury conviction where the context made it "obvious" that a defendant used a different definition of "prepare" and "preparation" than that employed by the prosecutor, rendering her statements literally true. *Id.* at 375–76. We face no such quandary here.

First, Godfrey didn't use the word "plans," so there was no disconnect between the question and answer as in *Hairston*. Second, it's not obvious which definition Smith intended. And third, even accepting Smith's premise, the jury had substantial evidence to reasonably conclude that Smith's "plans" to go to Syria constituted a "detailed proposal." After all, Smith discussed with Khalid his desire to go to Syria and his idea to finance that trip by working with Bilal. So a reasonable jury could find Smith lied when answering Godfrey's first question.

2.

Smith next argues that the government failed to prove he knowingly and willfully made false statements. In conversations with Khalid discussing travel to Syria and joining ISIS, Smith often responded in Arabic, saying "inshallah" or "na'am." Khalid, fluent in Arabic, told the jury that he understood those words as affirmations to his questions.

Smith now contends that because the government didn't present expert testimony on Arabic, the jury didn't have "sufficient evidence to interpret" his responses. Appellant's Br. at 50. So, says Smith, the jury couldn't conclude what he "actually meant when he said [those] words." *Id.*

The problem for Smith is that the jury heard sufficient evidence of his conversations with Khalid *in English* to conclude that Smith knowingly and willfully lied to the FBI. For example, when they first met, Smith told Khalid, "There is a particular family in Syria . . . that I went there one time before to visit. . . . I want to go back to them." S.J.A. 1–2. And in their third meeting, Khalid asked Smith, "[W]hat's your plans [sic] for Syria," to which Smith responded, "I need to get the money to get there . . . and that's what we're working on so I can have the money to get there." S.J.A. 37. To that end, the jury heard that Smith worked with Bilal to earn money for his trip.

We thus find that the government presented enough direct and circumstantial evidence for a reasonable jury to conclude that Smith acted with the requisite intent when he denied ever discussing his desire or plans to travel to Syria. *See United States v. Dennis*, 19 F.4th 656, 665 (4th Cir. 2021) (In reviewing the denial of a Rule 29 motion, "[w]e must consider both circumstantial as well as direct evidence.").

3.

Smith also challenges the materiality of his untruthful responses. According to Smith, denying his travel plans couldn't have affected the FBI's actions. Smith says his interview was a "Hail Mary" at the end of the investigation and that the FBI already knew the answers to its questions. Appellant's Br. at 42. We reject this contention.

"A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed." *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998) (cleaned up). The government "must prove materiality by reference to the particular government agency or public officials that were targeted"—here, the FBI. *United States v. Raza*, 876 F.3d 604, 617 (4th Cir. 2017). This inquiry is ultimately "an objective test." *United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012). It's irrelevant "whether the false statement *actually influenced* the [FBI's] decision-making process." *Id.* (emphasis added).

Smith's denials of his travel plans to Syria were material to the FBI's investigation. As Godfrey told the jury, the FBI began investigating Smith because the agency was "very concerned that he may be going [to Syria] to join ISIS." J.A. 495. Smith's denials that he discussed the very plans which prompted the FBI's inquiry, if believed, "were capable of influencing the direction of the investigation." *United States v. Barringer*, 25 F.4th 239, 251 (4th Cir. 2022) (cleaned up). These "misrepresentations, under normal circumstances, could cause FBI agents to re-direct their investigation to another suspect, question their informant differently or more fully, or perhaps close the investigation altogether." *United States v. McBane*, 433 F.3d 344, 352 (3d Cir. 2005). That's enough to satisfy our review.

Smith's claims to the contrary miss the mark. Even if the FBI's interview was (as Smith puts it) a "Hail Mary," a reasonable jury could find that Smith's false statements were *capable* of influencing the FBI's still-active investigation. *See United States v. Fondren*, 417 F. App'x 327, 336 (4th Cir. 2011) (rejecting that "statements could not be material given that the [FBI's] investigation was essentially complete"). And that "the FBI investigators already knew the answers to the questions they asked him" makes no difference to our inquiry. *Id.* (collecting cases).

B.

In challenging his Count Two conviction, Smith narrows his focus to the falsity and materiality of his relevant statements. Count Two charged Smith with "falsely stating to FBI Special Agents . . . that he did not know that [Hilal] intended to use the buddy pass procured by [Smith] to travel and support ISIS." J.A. 21.

Smith's contentions here turn on one underlying fact—Hilal was a fictitious person invented by the FBI. Smith says he truthfully denied knowing Hilal's intentions because those intentions never existed. And denying knowledge about Hilal's intentions couldn't have influenced the FBI's decision-making, Smith claims, because his untruthfulness alone can't establish materiality. We reject these arguments.

1.

As before, we begin with Smith's falsity challenge. Smith reasserts a literal-truth defense. This time, he argues that denying knowledge of Hilal's intentions was truthful because he "could have no knowledge of a person who does not exist, nor could he know the intentions of a non-existent person." Appellant's Br. at 34. Smith's contention thus rises and falls with the meaning of "knowledge."

We recently explored this terrain, finding the term "knowledge" "broad and somewhat ambiguous." *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 266 (4th Cir. 2021). Though "knowledge" can mean "'[a]n awareness . . . of a fact or circumstance' or the 'condition of having information' about something," it can also signify "'a state of mind in which a person has no substantial doubt about the existence of a fact.'" *Id.* (quoting *Knowledge*, Black's Law Dictionary (11th ed. 2019); *Knowledge*, Merriam-Webster

Dictionary, https://www.merriam-webster.com/dictionary/knowledge). The result is that "knowledge" can mean either an awareness of an objective truth *or* a person's subjective understanding of a thing. *See id.*

Smith urges us to adopt the former meaning and ignore the latter. But the literal-truth defense doesn't permit us to disregard one construction of an ambiguous question in favor of another. *See Sarwari*, 669 F.3d at 407. Godfrey asked Smith whether he "knew" that Hilal was planning to use the buddy pass to travel to Syria and join ISIS. S.J.A. 81 at 2:04:40–2:05:20. A reasonable jury could decide, upon hearing the full interview, that Godfrey's question went to Smith's subjective understanding of Hilal's intentions, rather than an awareness of the objective truth of those plans. So Smith's defense fails here, too.

Smith disputes this conclusion, pointing us to the Third Circuit's decision in *United States v. Castro*, 704 F.3d 125 (3d Cir. 2013). In *Castro*, our sister court vacated a defendant's § 1001 conviction for lying to FBI agents about receiving extorted funds. *See id.* at 139–41. The defendant had unwittingly hired FBI agents posing as "debt collectors" to coerce a former business partner into repaying an investment in a failed venture. *Id.* at 130. Though the defendant accepted purportedly extorted money from the collectors, he later denied ever receiving any payment from his old partner. *Id.* at 132.

The court found this denial was "completely, if unintentionally, accurate." *Id.* at 139. It was undisputedly true that the defendant never received any money from his partner—it came from the FBI. *See id.* at 140. Whether he "subjectively believed he was lying" made no difference, the court said, because "our legal system does not convict people of being bad." *Id.*

We find *Castro* inapt to Smith's case. The issue of falsity in *Castro* turned on the source of a payment. Here, the falsity of Smith's statements turns on his state of mind—more specifically, his understanding of Hilal's travel plans. On that point, the government offered ample evidence.

Khalid asked Smith to buy the buddy pass for Hilal because Hilal intended to fly from Florida to New York and eventually make his way to "you know where," meaning Syria. J.A. 708. Khalid also described how he told Smith that Hilal was "very important for us," meaning ISIS. J.A. 708. The jury was free to disbelieve Khalid's account having heard all the recorded exchanges, but its determination is not for us to question. *See United States v. Wilson*, 484 F.3d 267, 283 (4th Cir. 2007) ("If the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe." (cleaned up)).

In short, substantial evidence supports the jury's finding of falsity on Count Two.

2.

Smith next contends that the government failed to prove the materiality of his false statements denying knowledge of Hilal's travel plans.

The government again relied on Godfrey's testimony to establish this element. Godfrey explained that he asked the Hilal-related questions because the FBI needed to establish "a baseline of truth" with Smith for additional questioning on the buddy pass. J.A. 801. The FBI wanted to learn more about the involvement of Smith's wife and the person who had lent his credit card to buy Hilal's plane ticket. The FBI didn't know whether that other person was someone "whose ideology was aligned with ISIS" or just an "unwitting accomplice." J.A. 802.

But each question Godfrey asked risked revealing more of the FBI's working knowledge gained in the investigation. In turn, sharing that knowledge with Smith could have compromised its investigation because Smith might have disclosed it to persons of interest. Once Smith lied about knowing Hilal's travel plans, Godfrey didn't think it worthwhile to compromise the FBI's investigation in return for more untruthful answers.

Smith dismisses this theory and its supporting evidence, arguing that his credibility alone could never be material to the FBI's investigation, particularly where his untruthful statements were based on the agency's own made-up narrative. To permit a finding of materiality on these facts, Smith says, "is to eliminate [that] requirement altogether and transform nearly any false statement into a material one." Appellant's Br. at 24.

But it bears emphasizing that a false statement is material under § 1001 when it has "a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed." *Hamilton*, 699 F.3d at 362 (cleaned up). The Supreme Court has explained that a jury, before applying this legal standard, must first make two factual findings: the defendant's relevant statement and the decision the government agency was trying to make. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995). Considering this framework, we're satisfied that a rational jury could find Smith's false statements about Hilal material to the FBI's investigation.

Here, the FBI wasn't only trying to discern whether Smith intended to provide material support to a terrorist organization. The agency was also trying to understand what role Smith's wife and the credit-card owner had in the apparent scheme. So the FBI's decision-making at this stage encompassed its investigation into the conduct of Smith, his wife, and the other person participating in Smith's activities. *See Fondren*, 417 F. App'x at 335.

From there, we think it plain that Godfrey's testimony adequately supports the jury's materiality finding. The FBI had to make a cost-benefit assessment during Smith's interview—how much of its investigation was it willing to compromise and what information would it receive in return. Smith's false statements on the buddy pass influenced that assessment by informing the FBI what lines of questioning might be fruitful. For instance, the FBI decided that Smith wasn't a viable source to investigate the person who purchased the buddy pass. But had the FBI believed Smith truthfully answered its Hilal-related questions, a reasonable jury could accept Godfrey's testimony as proof that the FBI might well have questioned Smith differently, potentially changing the course of the investigation.

Taking the evidence in the light most favorable to the government, as we must, Smith's false answers "were capable of influencing the direction of the investigation." *Barringer*, 25 F.4th at 251 (cleaned up); *cf. Sarihifard*, 155 F.3d at 307 ("[E]ven if a grand jury disregards a witness's false testimony, the false testimony may impede the grand jury's capacity to attain an accurate and prompt resolution of the matter under consideration.").

In concluding as much, we reject Smith's contention that his credibility alone could never be material to the FBI's investigation. The Supreme Court, in assessing § 1001, has held that "the investigation of wrongdoing is a proper governmental function; and since it is the very purpose of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function." *Brogan v. United States,* 522 U.S. 398, 402 (1998) (emphasis omitted).

So too here. At its core, the FBI's purpose was to discover the truth underlying Smith's potentially criminal enterprise. Smith's false statements thus weren't harmless lies told in a vacuum; they related to other subjects of the FBI's investigation. Under such circumstances, we conclude that Smith's answers—though revealing only his untruthfulness—could alter the FBI's decision-making.[6] *See United States v. Lupton*, 620 F.3d 790, 806–07 (7th Cir. 2010) ("When statements are aimed at misdirecting agents and their investigation, even if they miss spectacularly or stand absolutely no chance of succeeding, they satisfy the materiality requirement of 18 U.S.C. § 1001.").

The Supreme Court's decision in *Kungys v. United States*, 485 U.S. 759 (1988), doesn't change our conclusion. There, the Court addressed materiality under 8 U.S.C. § 1451(a), which provides for the denaturalization of citizens whose citizenship was "illegally procured or [was] procured by concealment of a material fact or by willful misrepresentation." *Id.* at 764 n.1 (cleaned up). The government had argued that the defendant's false statements in his visa and naturalization applications disqualified him from citizenship. *See id.* at 764–65. It said that § 1451(a)'s misrepresentation clause and "illegally procured" clause both applied—the latter because the defendant's false statements rendered him ineligible for a good-moral-character finding (a requirement for

[6] For these reasons, we likewise reject Smith's assertion that his lies couldn't influence the FBI's investigation because the agency fabricated the facts underlying his false statements.

naturalization) under 8 U.S.C. § 1101(f)(6). *See id.* The Third Circuit agreed only on the former point, finding the defendant made material misrepresentations. *Id.* at 766.

In reversing and remanding for reconsideration, the Supreme Court clarified that courts should apply § 1001's materiality standard—and no other formulation—to § 1451(a)'s misrepresentation clause. *See id.* at 769–72. The Court then declined to reach the government's alternate basis for affirming under § 1451(a)'s "illegally procured" clause for violation of § 1101(f)(6), which bars a finding of good moral character if a person gives "false testimony" to obtain immigration benefits. *Id.* at 779. It addressed only the Third Circuit's conclusion that false testimony under § 1101(f)(6) had to be material. *See id.* Unlike § 1451(a)'s misrepresentation clause, the Court said, § 1101(f)(6) has no such materiality requirement. *Id.* The Court explained the divergence between the statutes not just by their plain language but also by their purposes: § 1451(a)'s to prevent "false pertinent data from being introduced into the naturalization process," and § 1101(f)(6)'s to "identify a lack of good moral character." *Id.* at 780.

Smith suggests that the *Kungys* court's disparate treatment of false statements under those statutes highlights the insufficiency of untruthfulness alone as proof of materiality. He argues that our interpretation of materiality reduces § 1001(a)(2) to a good-moral-character provision like § 1101(f)(6).

Smith is wrong. For one, the *Kungys* majority didn't answer whether the defendant's untruthfulness was material to his procurement of citizenship, as § 1451(a) requires. *See id.* at 767–72. But even if a defendant's untruthfulness alone couldn't possibly influence the government's naturalization decision, an ongoing criminal investigation presents a far different inquiry. As we've outlined, our focus is on the particular agency to which a defendant lied—*see Raza*, 876 F.3d at 617—and any falsehood going to the heart of an FBI investigation can influence it. *See Brogan*, 522 U.S. at 402.

A final point. Smith complains that the FBI's pertinent decision must be more than just "the decision to ask more questions." Appellant's Br. at 25–26. He warns that, if we sanction this theory, FBI agents will always be able to advance after-the-fact justifications in service of materiality. Not so. Our precedent has long held that the government must offer sufficient evidence to prove materiality (as it did here). *See United States v. Ismail*, 97 F.3d 50, 61 (4th Cir. 1996). That's an adequate safeguard against theories premised on an agency's afterthoughts.[7]

In sum, we conclude that Smith's false statements denying his knowledge of Hilal's travel plans could have influenced the FBI's investigation. So they were material.

IV.

Smith also contends that one of the district court's instructions and an unrelated comment during trial allowed the jury to convict him without determining whether his

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[7] Because a defendant may invoke his right to remain silent in an FBI interview, Smith also argues it is "entirely speculative" for a jury to conclude how the investigation would have proceeded had he been truthful. Appellant's Br. at 25. Of course, if Smith had remained silent or told the truth, there would be no materiality inquiry as there would be no crime. In any event, Smith ignores that our focus is on his false statements' *potential* to alter the FBI's investigation. *See Barringer*, 25 F.4th at 251 ("Whether the false statement actually influenced an agency's action is irrelevant.").

statements were false. Because Smith didn't object to the instruction or the comment, we review for plain error. *See United States v. Hope*, 28 F.4th 487, 493 (4th Cir. 2022). These claims, however, are meritless.

Smith first challenges the court's jury instruction that "the government is lawfully permitted to use decoys and deception to conceal the identity of its informants." J.A. 982. While Smith characterizes this instruction as misleading, he doesn't dispute that it's a correct statement of the law. So the court appropriately instructed the jury as much. *See United States v. Hurwitz*, 459 F.3d 463, 474 (4th Cir. 2006) ("We review a jury instruction to determine whether, taken as a whole, the instruction fairly states the controlling law." (cleaned up)).

Second, the court stated in response to an objection, that "we have two counts of a violation of 1001, which indicate that there were . . . two falsehoods here." J.A. 835. Smith argues this statement misled the jury to believe the government had established those two falsehoods. But context proves otherwise. Shortly after, the court said, "The question is, were these two lies told or not?" J.A 835. And the court fully instructed the jury on the elements of a § 1001(a)(2) offense, including falsity. We find no error here, much less a plain one.

V.

We now address the district court's refusal to give the jury an entrapment instruction. We review a district court's decision to give (or not give) a jury instruction for abuse of discretion. *See United States v. Hassler*, 992 F.3d 243, 246 (4th Cir. 2021).

"[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. 58, 63 (1988). To establish inducement, "a defendant must show that the government acted in an excessive manner that would prompt a reasonably firm person to commit a crime." *Sarihifard*, 155 F.3d at 308. Only when a defendant makes this prima facie showing does the burden shift to the government to prove the defendant's predisposition to the criminal conduct. *United States v. Young*, 916 F.3d 368, 375–76 (4th Cir. 2019).

But "[t]he district court is the gatekeeper." *United States v. Hackley*, 662 F.3d 671, 681 (4th Cir. 2011). If a defendant can't produce "more than a mere scintilla of evidence of entrapment, the court need not give the instruction." *Id.* (cleaned up).

In requesting an entrapment instruction, Smith argued that the government had induced him to lie to FBI agents by serving his wife with a subpoena. At trial, Godfrey testified about these pressure tactics on Smith's wife. Godfrey had called her "the weakest link," and he told the jury about the FBI's plan to use her to get to Smith. J.A. 590. To execute this plan, Godfrey approached Smith's wife for an interview at her job, and he had the grand jury subpoena delivered to her mother's house.

The district court declined Smith's request for an instruction, concluding he hadn't shown "an inducement to commit perjury." J.A. 923. The court explained that there was no evidence that the FBI subpoenaed Smith's wife to "get him to come down" and lie to agents. J.A. 923. That decision, the court reasoned, was Smith's alone.

We see no abuse of discretion. Smith offered no evidence to suggest the FBI induced him into *lying*, even if the agency aimed to get him in the hot seat. *See United States v. Russell*, 411 U.S. 423, 436 (1973) ("It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.").

Godfrey warned Smith at the outset of the interview that the only way he could "create any possible problems" was by "being deceptive or untruthful." S.J.A. 81 at 1:24:00–1:24:15. Godfrey even gave Smith a copy of § 1001's text during the interview—before the Hilal questions—informing him that lying to the FBI was a criminal offense.

The FBI's repeated efforts to ensure Smith told the truth belie any claim that agents coaxed him into lying. *See United States v. Kennedy*, 372 F.3d 686, 698 (4th Cir. 2004). And the mere fact that agents knew Smith might lie about Hilal's travel plans after falsely denying his own doesn't amount to inducement. *See Sarihifard*, 155 F.3d at 308–09.

VI.

Finally, Smith maintains that his sentence is procedurally unreasonable because the district court erroneously imposed the terrorism enhancement under U.S.S.G. § 3A1.4. "Application of the terrorism enhancement provides a twelve level enhancement—and an automatic criminal history category of VI—when 'the offense is a felony that involved, or was intended to promote, a federal crime of terrorism.'" *United States v. Chandia*, 514 F.3d 365, 375 (4th Cir. 2008) (quoting U.S.S.G. § 3A1.4). In turn, a "federal crime of terrorism" has two elements: (1) "the commission of one of a list of specified felonies";

and (2) "a specific intent requirement, namely, that the underlying felony was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." *Id.* (cleaned up).

Smith claims the district court erred in applying the terrorism enhancement because it failed to expressly find specific intent. Indeed, our precedent compels a district court to identify the evidence underpinning its specific-intent finding when "the basic facts supporting the conviction do not give rise to an automatic inference of the required intent." *Id.* at 376.

But we need not delve into this question given that we're remanding for resentencing because of the district court's error on multiplicity. On remand, the district court can address the merits of Smith's claim regarding the terrorism enhancement.

VII.

In sum, we reverse the district's denial of Smith's motion to dismiss Count Two of the indictment as multiplicitous, vacate the judgment, and remand for resentencing. We otherwise affirm.

AFFIRMED IN PART, REVERSED IN PART,
VACATED AND REMANDED FOR RESENTENCING

TOBY HEYTENS, Circuit Judge, concurring:

As the Court explains, the theory of entrapment Smith presented here is insufficient to state a prima facie case of inducement and thus provides no basis for overturning Smith's convictions. I write separately to note that Smith may have been able to establish a valid entrapment defense under a different theory—and to caution that similar government conduct may not be countenanced in future cases.

I.

It is well established that the government may "use undercover agents to enforce the law" and "afford opportunities or facilities for the commission of [an] offense." *Jacobson v. United States*, 503 U.S. 540, 548 (1992). In doing so, however, the government "may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Id.*

These principles apply equally to prosecutions under 18 U.S.C. § 1001. In *Brogan v. United States*, 522 U.S. 398 (1998), the Supreme Court rejected the "exculpatory no" defense, under which some courts had carved out an exception to criminal liability under Section 1001 "for a false statement that consists of the mere denial of wrongdoing." *Id.* at 399. "Whether or not the predicament of the wrongdoer run to ground tugs at the heartstrings," the Court explained, "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie." *Id.* at 404. At the same time, however, the Court emphasized that "background interpretive principle[s] of general application"—including that criminal statutes do not "cover violations produced by entrapment"—remain applicable in Section 1001 prosecutions. *Id.* at 406.

In a separate opinion, Justice Ginsburg underscored the importance of these principles. As she noted, Section 1001 "arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt." *Brogan*, 522 U.S. at 409 (Ginsburg, J., concurring in the judgment). In particular, "the sweeping generality of § 1001's language" creates the risk "that an overzealous . . . investigator—aware that a person has committed some suspicious acts, but unable to make a criminal case—will create a crime by surprising the suspect, asking about those acts, and receiving a false denial." *Id.* at 416.

II.

The facts of this case appear to implicate Justice Ginsburg's concerns. Smith initially drew the FBI's attention because he had expressed interest in traveling to Syria. Yet simply going to Syria—even with the intent to participate in jihad against Bashar al-Assad's regime—is not a federal crime, and Smith's early conversations with the government's primary informant referenced entities not designated as foreign terrorist organizations. Cf. 18 U.S.C. § 2339B (making it a crime to "knowingly provide[ ] material support . . . to a foreign terrorist organization, or attempt[ ] . . . to do so"). ISIS, of course, is a designated foreign terrorist organization. See 79 Fed. Reg. 27972 (May 15, 2014); 8 U.S.C. § 1189(a)(2)(A)(ii), (B)(i). But it was a government-compensated informant, not Smith, who first mentioned ISIS—to the point of making Smith swear allegiance to ISIS as a condition of assisting with Smith's otherwise lawful aim of traveling to Syria. And, in any event, the government never charged Smith with actually providing (or attempting to provide) material support to ISIS.

The government, however, had another route to secure a conviction. Beyond requiring Smith to swear allegiance to ISIS, the government's primary informant did something else: He told Smith not to tell anyone about their conversations about ISIS. See, *e.g.*, SJA 16 ("ABU KHALID: . . . keep yourself down . . . don't talk to nobody about this."). And then, during a later interview, FBI agents asked Smith about the very conversations and topics the informant had directed Smith not to disclose. Consistent with the informant's advice, Smith falsely denied having spoken with any of the government's informants about traveling to Syria to join ISIS. And, with that, the government finally had a crime: making false statements, in violation of 18 U.S.C. § 1001.

In this case, therefore, the government was not merely "aware that [Smith] ha[d] committed some suspicious acts." *Brogan*, 522 U.S. at 416 (Ginsburg, J., concurring in the judgment). Instead, it might have been argued that by having one government agent (an undisclosed confidential informant) raise the topic of ISIS and urge Smith not to disclose those conversations to anyone, and then having another set of government agents (the FBI) ask Smith about those very same conversations, the government "originate[d] a criminal design" and "implant[ed] in an innocent person's mind the disposition to commit a criminal act." *Jacobson*, 503 U.S. at 548.

This combination of circumstances might have distinguished Smith's case from others where we have not found an entrapment instruction necessary. In *United States v. Sarihifard*, 155 F.3d 301 (4th Cir. 1998), for example, this Court concluded an entrapment defense would have failed where "there [was] no evidence suggesting that the government's *purpose* in questioning the defendant was the solicitation of perjured testimony." *Id.* at 308 (emphasis added). Here, in contrast, a jury might have been able to find that when FBI agents asked Smith about matters the government's own informant had instructed Smith not to disclose to anyone, their purpose was to get Smith to lie and then convict him for having done so.*

Smith, however, has not claimed that the government's undisclosed confidential informant—rather than the fully disclosed FBI agents—induced him to commit the crime of lying to the FBI. For that reason, we need not decide whether the informant's actions could have given rise to a valid entrapment defense, and I concur in the Court's decision rejecting the argument presented here.

* A valid entrapment defense also requires "a lack of predisposition on the part of the defendant to engage in the criminal conduct." *United States v. Blevins*, 960 F.2d 1252, 1257 (4th Cir. 1992). Here too, the record suggests Smith might have had a colorable claim. Consider, for example, Smith's willingness to voluntarily talk to the FBI, truthfully offer up names and descriptors of the informants, and describe his and his wife's roles in buying the airline's discounted buddy pass.

DIAZ, Circuit Judge, dissenting in part:

I join all but Part II of the Court's opinion. In my view, the district court correctly denied Smith's motion to dismiss Count Two as multiplicitous.

"When a defendant is charged with multiple violations of the same statute arising from the same course of conduct, the court must consider '[w]hat Congress has made the allowable unit of prosecution.'" *United States v. Shrader*, 675 F.3d 300, 313 (4th Cir. 2012) (quoting *Bell v. United States*, 349 U.S. 81, 81 (1955)). This inquiry asks us to "look to the language of the statute, being mindful that any ambiguity must be resolved in favor of the defendant under the rule of lenity." *Id.* (cleaned up). Whether two counts are multiplicitous is a question of law we review de novo. *Id.*

Section 1001 punishes, in part, "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation." 18 U.S.C. § 1001(a)(2). At bottom, § 1001(a)(2) defines the crime (and so the unit of prosecution) in terms of a single statement or representation. *See United States v. Dunford*, 148 F.3d 385, 389 (4th Cir. 1998) (explaining that, under a literal construction, "any" in the context of a singular noun means a "single" item).

Section 1001's legislative history supports this construction. Originally, § 1001 prohibited false "statements or representations." 18 U.S.C. § 1001 (1948). But Congress revised the statute to take on a singular form, now prohibiting any false "statement or representation." 18 U.S.C. § 1001(a)(2) (1996). Thus, each nonidentical statement or representation (not each interview) is the unit of prosecution.

True, the terms "statement" and "representation" can accommodate either a single assertion or a series of the same. *See Statement*, Oxford English Dictionary (3d ed. 2012), https://www.oed.com/view/Entry/189259 (last visited November 28, 2022) (defining "statement" as both "[a] formal written or oral account of facts" and "[a]n expression of something . . . a declaration, an assertion"); *Representation*, Oxford English Dictionary (3d ed. 2009), https://www.oed.com/view/Entry/162997 (last visited November 28, 2022) (defining "representation" as "a spoken or written statement"). But "we disfavor interpretations of statutes that render language superfluous." *Alexander v. Carrington Mortg. Servs., LLC*, 23 F.4th 370, 379 (4th Cir. 2022) (cleaned up). So these usually synonymous terms shouldn't carry the same meaning in § 1001—one should mean a single assertion, and the other, a series. I'm satisfied that Congress permitted the prosecution of either a single lie or a series of lies.[1]

The Supreme Court's test in *Blockburger v. United States* confirms our conclusion that each *nonidentical* false statement or representation may be prosecuted, asking "whether each [offense] requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932); *see, e.g.*, *Shrader*, 675 F.3d at 314. Indeed, we have used this test once before in the § 1001 context, though in an unpublished decision. *See United States v. Jameson*, Nos. 91-5848, 91-5849, 91-5876, 1992 WL 180146, at *9 (4th Cir. July 29, 1992) (per curiam).

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[1] Because both counts charged Smith with making a false statement *and* representation, I need not assign each term its corresponding definition.

In *Jameson*, we held that "each nonidentical false statement made may be charged as a separate violation." *Id.* (cleaned up).[2] Applying *Blockburger*, we reasoned that the government had to establish the falsity of two separate responses on a single form through different facts. *See id.* at *9–*10. So each nonidentical false response supported a separate § 1001 offense. *Id.* I find *Jameson*'s reasoning persuasive.

Here, the falsity of Smith's statements in Counts One and Two turned on proof of different facts. Count One required the government prove Smith lied about his own "desire or plans to travel to Syria." J.A. 20. For Count Two, the government had to prove that Smith lied about his knowledge of Hilal's travel plans. So each count required proof of Smith's understanding of different travel plans, confirming that his convictions aren't multiplicitous.

Our decision in *United States v. Mason*, 611 F.2d 49 (4th Cir. 1979), is not to the contrary. There, we concluded that 18 U.S.C. § 922(a)(6)'s prohibition on making "any false or fictitious oral or written statement" in connection with a firearm or ammunition sale presented an ambiguous unit of prosecution. *Id.* at 52 (cleaned up). We thus resolved § 922(a)(6)'s unit of prosecution in the defendants' case as a course of conduct rather than each false statement, dismissing their multiplicitous convictions. *See id.* at 52–53.

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[2] Each circuit to address this question has arrived at the same conclusion. *See United States v. Meuli*, 8 F.3d 1481, 1485–86 (10th Cir. 1993); *United States v. Segall*, 833 F.2d 144, 146–48 (9th Cir. 1987); *United States v. Guzman*, 781 F.2d 428, 432–33 (5th Cir. 1986); *United States v. Anderson-Bagshaw*, 509 F. App'x 396, 411–13 (6th Cir. 2012); *United States v. Bustamante*, 248 F. App'x 763, 764–65 (8th Cir. 2007) (per curiam).

Acknowledging the similarity between the language in § 922(a)(6) and § 1001(a)(2), I nonetheless reach a different result here.

Mason dealt with two defendants' false denials of their felon status on multiple forms they submitted to a gun dealer when making multi-firearm purchases—one form for each gun. *See id.* at 50–51. Beyond § 922(a)(6)'s language, *Mason* relied on "the manner in which the Gun Control Act [had] been administered by the Bureau of Alcohol, Tobacco and Firearms." *Id.* at 52.

We found that the Bureau hadn't required multiple certification forms in a multi-firearm purchase—that discretion was left to the individual gun dealer. *See id.* at 52–53. Because "a particular gun dealer's practice shouldn't control the application of a federal criminal statute," we held each course of lying, not each lie, was the allowable unit of prosecution. *Id.* at 53. And "nothing in [§] 922(a)(6) or its legislative history" suggested that Congress intended otherwise. *Id.*

Mason's reasoning doesn't control this case. For starters, the Gun Control Act's administration has no bearing here. There's no comparable administration of § 1001(a)(2). But more importantly, § 1001's legislative history *does* suggest that Congress intended each individual, nonidentical false statement to be the unit of prosecution.

Accordingly, the district court correctly denied Smith's motion to dismiss Count Two as multiplicitous. Because my colleagues hold otherwise, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 3:17-cr-182
	)	
vs.	)	VOLUME III
	)	
ALEXANDER SAMUEL SMITH,	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE MAX O. COGBURN, JR.
UNITED STATES DISTRICT COURT JUDGE
MARCH 21, 2019

APPEARANCES:

On Behalf of the Government:

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On Behalf of the Defendant:

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MYRA CAUSE, ESQ.
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Cheryl A. Nuccio, RMR-CRR
Official Court Reporter
United States District Court
Charlotte, North Carolina

(Court back in session at 9:30 a.m.)

(Jury not present.)

MR. TATE: Apologize, Your Honor. I had to get some things squared away with Mr. Smith.

THE COURT: No, that's okay. I knew what you were doing, Mr. Tate.

Are you going to be able to cue those up and get those done fairly...

MR. TATE: Yeah, we're ready to proceed. We'd ask to recall Agent Godfrey.

THE COURT: Absolutely. We'll call him as soon as the jury is in here.

MR. TATE: Okay.

THE COURT: Do you want to do any Rule 29s to start with?

MR. TATE: I think based on Rule 29(a) of the Rules -- Criminal Rules of Criminal Procedure, we move for judgment of acquittal on both counts because the government has failed to articulate sufficient facts to allow a reasonable jury to conclude beyond a reasonable doubt that Mr. Smith, one, had, in fact, knowingly and willfully made a false, fictitious, and fraudulent statement. Number two, that the statement was material as defined by law. And fourth, that the representation pertained to a matter of jurisdiction of the government of the United States.

The most glaring defect is that there's no evidence that Mr. Smith knowingly and willfully did so. This is a case involving false statements where he was not told what false statements he was being questioned about. He came in under a ruse of talking about a buddy pass. It then turned into interactions he had with a confidential informant that he did not know was an informant.

Specifically, the indictment alleges that he made these statements to the source and he never was identified. The source was never identified to him. They talked about Abu Khalid, but they never specifically said, "Mr. Smith, did you talk to a guy name Abu Khalid about going to Syria?" And as the agent testified, they gave him broad questions that would allow him to talk and he said many times, "I talked to many, many Muslims about ISIS and everything else."

So we believe that that negates the knowingly and willful element and we move for judgment of acquittal based on Rule 29(a) on both counts.

THE COURT: Okay. Motion will be denied. I think the evidence is clear that the -- as to what was -- that the -- that there is evidence -- there is clear evidence. Whether the jury decides they've proved beyond a reasonable doubt that it was the defendant who wanted to travel to Syria and that there is some dispute about what the reasons were -- but this was a -- there was significant discussion about ISIS under whatever its names are, Daesh, the people at that time who were fighting in Syria.

The Kodaimatis, there's some question as to whose side they were on. It seems from the testimony the Court gleaned that there was some evidence that they were not fighting on the side of the Free Syrian Army or anybody -- they were opposed to Assad, but just about everybody except the Russians and the Alawites were opposed to Assad.

So there is plenty of evidence concerning joining a terrorist organization that was against the United States. Based on that, the investigation they did, they certainly did call him down. They were entitled to find out as part of this investigation what he knew. Was he still radicalized? Was he -- had he -- had he decided that this was something he was not going to do or was he still part of the -- was he still hanging in there with those folks? Those questions were legitimate questions that they could ask to determine whether they had a potential terrorist in their midst or someone who had really seen the light and backed away from the -- from the terror aspects of this. Based on that, they had every right to call him down and question him.

And there's enough evidence to go to the jury that faced with this interrogation, that he did not give truthful testimony about his contacts with people that he believed at the time were -- or at one time he believed, whether he still believed it or not is the question. But he was not willing to give up the people he had talked to about -- Mr. Khalid, or whatever, about his -- about going to Syria. He was not going to give information against him and was going to lie about his contacts therein. So I think there's evidence to go to the jury with regard to those, so that will be denied.

With regard to the instructions, where the Court is right now, the Court is thinking about -- and I haven't made a final decision -- is thinking about giving the instruction on witness use and that sort of thing with maybe a stronger -- a stronger pound to the jury that the defendant has no -- does not have to put on any evidence, and then -- and not giving the consciousness of guilt. Because what's the consciousness of guilt of? Of the lie? Well, of course he had -- if he's lying, he had consciousness of guilt if he lied. That's the crime. Normally what happens is you've robbed a bank and they say, "Were you in that area that day?" "No, not me," and he knew he was in the area. Why would he lie about it except that -- so it dealt with -- the lie is separate from the actual crime. And so the Court, I think, is going to not give the consciousness of guilt.

And with regard to the entrapment one, I do not believe that that applies in this case, and I'll talk more about that when the time comes.

But I'll make a final decision on these. I've read

THE COURT: Okay. Any motions at this time?

MR. TATE: Your Honor, pursuant to Rule 29(b), after the defendant's presentation of evidence, I think many of the statements contained in Defense Exhibits 7A, B, and C addressed some of the Court's concerns and basis for denying the Rule 29(a) motion. We renew for the same grounds under Rule 29(b) for a motion of judgment of acquittal on all counts.

THE COURT: Okay. That motion will be denied. I do believe there's -- that there's a context. It doesn't come down to just one simple statement as to each of these counts. There is a full context of it. But a jury -- a jury hearing this evidence could find from the evidence that the defendant violated 1001 during the interview; and so the Court will -- the Court will deny the motions, although I understand what the clips said there and it adds some context to everything.

Okay. The -- with regard to the entrapment issue, Mr. Savage, what legitimate -- what legitimate matters were being investigated at the time, does the government say, when the interviews were conducted?

MR. SAVAGE: I think the record speaks for itself. Agent Godfrey testified at length about that.

THE COURT: It does, but I want to hear what you -- I want to hear any argument that you wish to make.

MR. SAVAGE: Well, the government was investigating