In the

Supreme Court of the United States

SAMUEL BRONSTON,

Petitioner,

v.

UNITED STATES,

Respondent.

No. 71- 1011

Washington, D. C.
November 15, 1972

Pages 1 thru 45

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Wednesday, November 15, 1972.

The above-entitled matter came on for argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

SHELDON H. ELSEN, ESQ., Orans, Elsen & Polstein, 10 East 40th Street, New York, New York 10016; for the Petitioner.

ANDREW L. FREY, ESQ., Assistant to the Solicitor General, Department of Justice, 20530; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 71-1011, Bronston against the United States.

Mr. Elsen, you may proceed whenever you're ready.

ORAL ARGUMENT OF SHELDON H. ELSEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ELSEN: Mr. Chief Justice, and may it please the Court:

This case is here on a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner was convicted on one count of perjury under the federal perjury statute, 18 USC 1621.

The appeal raises issues relating to the legal standards applicable under the federal perjury statute.

The conviction was affirmed in a split decision of the Circuit, two to one.

Now, the facts are quite simple and I will put them briefly.

The perjury arose out of interrogation in a hearing, the alleged perjury, and that's the question. The hearing was in a bankruptcy court before a referee in bankruptcy. The questioning was done by an attorney, for one of the creditors. The examination was under Section 21(a).

Now, the petitioner had a company. He was the sole

stockholder and the president. The company had filed a petition under Chapter XI of the Bankruptcy Act.

The purpose of the 21(a) examination was to inquire into assets of the corporation. Because of the petitioner's relation to the company, as president and sole stockholder, creditors and their counsel were entitled, if they so chose, to ask about his personal assets. And there is no dispute on that question.

Late in the afternoon of the examination, four questions were asked, which are the subject of this case. They're set forth at page 3 of our brief.

The two crucial questions were:

"Question: Do you have any bank accounts in Swiss banks, Mr. Bronston?

"Answer: No, sir.

"Question: Have you ever?

"Answer: The company had an account there for about six months, in Zurich."

The last two questions related to nominee accounts, and they are of no further consequence here.

The government did not dispute the truthfulness of either of these answers. Mr. Bronston had had a personal bank account in Geneva, and the prosecution proceeded on the theory that he committed perjury by not saying so in answer to the second question: "Have you ever?"

Now, it was undisputed that the account had been closed some two years before the questioning took place, and that it had been dormant for some four years before the questioning took place.

There were no assets in the account, and there had not been any assets beyond an insignificant amount since 1962, some four years before the questioning, some two years before the company filed its petition for an arrangement.

Although the accounts asked about were in Switzerland, this was not a numbered account. It was in Mr. Bronston's name. It was opened in an ordinary commercial transaction. His company did business in Switzerland. It was an international company that did business all over the world. He had a child in a school in Switzerland.

He drew checks on this account, and he signed them with his name.

QUESTION: Did the government know this -- did the prosecution know this at the time, or --

MR. ELSEN: At the time that they chose to indict?

QUESTION: At the time they questioned him?

MR. ELSEN: You mean whether the attorney for the creditor knew all this?

QUESTION: No, the -- at this hearing, at that time did the government know that he had had an account there?

MR. ELSEN: I don't know that, Mr. Justice Douglas.

The government was not a party to the hearing.

QUESTION: I understand --

MR. ELSEN: It was a private hearing.

QUESTION: When did the -- the government found out, but when did it find out?

MR. ELSEN: A creditor brought the information in to the government about the bank account, because Mr. Bronston had given his creditors a general waiver, so they could go into any bank account. The government did not call the man in to explain it, and they simply indicted.

I represented him at that time. It is not in the record, but I can tell you, we were never called in to talk about this case. And I would suspect that had this been explained, that there would not have been an indictment. But of course that's not a question of law.

QUESTION: You don't suggest that this was not an evasive answer? I'm not suggesting that's the issue in the case, but -- he's not indicted here --

MR. ELSEN: You mean as to the question of the exercise of prosecutive discretion? Mr. Chief Justice --

QUESTION: No, I'm speaking of the answer he gave to the creditor.

MR. ELSEN: Mr. Chief Justice, I would say this, and I want to answer your question directly, that had the witness been a candidate for high office and had answered

the questions in this fashion, and if I were sitting on a committee appraising it, I would be troubled by this kind of answer; but I would not have prosecuted him criminally.

QUESTION: Well, that's why I put the question.

MR. ELSEN: Yes.

QUESTION: Is it an evasive answer? It is an evasive answer --

MR. ELSEN: No, I don't say that it's evasive, and I will get into that. It may have been evasive.

QUESTION: Judge Lumbard thought it was -- as I read his dissent -- thought it was an evasive answer that should have put the questioner in search of more answers.

MR. ELSEN: Judge Lumbard proceeded on the assumption that the question was not ambiguous. If the question was directed at personal accounts, Mr. Chief Justice, then, of course, an answer about the company's account was a patently unresponsive answer and should have put the questioner on notice that he had to ask another question, and get an answer about a personal account.

Judge --

QUESTION: Judge Lumbard's theory, as I read his dissenting opinion, was that it was an unresponsive answer and a true statement.

MR. ELSEN: Correct. That's correct.

QUESTION: And it should, in turn, have led the

questioner to pursue it if they were thinking about a perjury proceeding.

MR. ELSEN: If he was interested in the account.

QUESTION: Yes.

MR. ELSEN: If he was interested in a personal adcount, he should have pursued this. He had a question answered, a truthful answer about the company. The company was in Chapter XI, not the individual. If, indeed, he were interested in a personal account, he should have known that he had not received information about a personal account and should have asked that next question: What about a personal account? That's what Judge Lumbard said, indeed.

Now, there are -- just to -- I think I have essentially completed the general picture of the facts, and I have mentioned that the account was uncovered -- not uncovered, but the records were procured by a creditor who had been given, along with other creditors, a general waiver.

Now, there are essentially three issues, one of which I will not discuss, the third being related to the evidence, I will not discuss that.

But I would like to frame it, and the Chief Justice has already taken me down that line, but if I may frame the issues: either the question "Have you ever?" was ambiguous, in which case there should have been questioning to dispel the ambiguity. But there was not perjury. It was ambiguous

because if a company executive is asked: "How many cars did you manufacture in June, Mr. Ford?", the word "you" applies to a company. "How long have you been driving?" applies to an individual. "Do you have any bank accounts in Switzerland, or have you had any bank accounts in Switzerland?" could apply to either.

And this is particularly true in the context of an American bankruptcy of an international company, because the assets in Switzerland or other foreign jurisdictions would not be under the jurisdiction of the American bankruptcy court, and creditors may very well have chosen to inquire into company accounts abroad, so that they might seek some form of ancillary bankruptcy.

There was indeed one in Spain; a creditor may have chosen to go into Switzerland. And that's another reason, Mr. Chief Justice, why I say it's not all that clear that this was an evasive answer.

Judge Lumbard proceeded on the assumption that he must have been talking about a personal account.

But when you reflect upon the problems of international bankruptcies of companies with assets all over the world, it's not unreasonable to believe that the witness thought he was being asked about the company's accounts. He answered about the company's accounts; and if the questioner meant personal, he could have said so.

But if we assume, as Judge Lumbard said, that it was not ambiguous but was directed to a personal account, then the questioner could not have been put off, it was patently unresponsive. It was about a company account.

And that raises, then, the second question of whether a truthful and clearly unresponsive answer should be the basis for a criminal conviction of perjury.

Now, it is that second question which I think raises the most intriguing conceptual problems, and which the Court may very well wish to ask more questions about. But I have chosen to argue first the question of ambiguity for the purpose of the clarity of the argument. I think you will find that if we have discussed that first, the whole discussion will proceed in a more easily followed manner.

When I begin the discussion of policy, I want to come back again to the point that I was discussing with the Chief Justice; that is, this is a criminal case. It's obvious, but it is fundamental here.

There was reference in some of the briefs to the fact that we want to encourage great candor when we have persons coming for executive commission and judicial appointment and admission to the bar, and I do not question any of that. I think that if we were passing on the admission of a person to a position of high public trust we would insist on the absolute maximum forthcoming type of candor in disclosure.

But that's a far cry from dealing with the question of a layman being asked questions by a lawyer who is satisfied with the answer, does not go on to ask the next question, and to put the layman in jail, or to brand him a felon. And that, I submit, is the issue here. It's obvious, but it can't be said too often. That's the issue.

QUESTION: Well, there's no question the jury found that he knew he was telling a falsehood or answering the question falsely?

MR. ELSEN: Mr. Justice White, the --

QUESTION: And is it your point that even if the jury found that, it's like any other case where there shouldn't have been -- there wasn't enough evidence to go to the jury? It should have been --

MR. ELSEN: That's correct, although, Mr. Justice White, I would probably prefer to phrase it in terms of the fact that the case on the evidence, on the government's evidence, did not fall within the standard which we should set down for a criminal case of perjury.

That's another way of putting the same thing.

QUESTION: Nevertheless, the jury -- you don't take any exception to the form of the instructions to the jury? Do you?

MR. ELSEN: Well, we're not raising that point on this appeal.

QUESTION: No, but if you --

MR. ELSEN: The government did say, at one point, that the ambiguity issue was charged to the jury; and that's not so. We've set forth the entire charge on this. The charge on ambiguity was specifically directed to the second count.

QUESTION: But the constructions seem to appear to be wholly consstent with the statute, and require the jury to find the elements of the offense under the statute.

MR. ELSEN: Yes. That's correct.

QUESTION: And the jury found them?

MR. ELSEN: The instructions were -- the judge charged to the contrary of our position on the question of a truthful answer, and the jury, following that instruction, found that --

QUESTION: So the jury found the elements of the offense, or they wouldn't have --

MR. ELSEN: That's correct.

QUESTION: Assuming that they followed the instruction?

MR. ELSEN: That's correct, assuming that the elements were correctly stated by the judge.

QUESTION: But your point, nevertheless, is that the case should never have gone to the jury on those facts.

MR. ELSEN: Should never have gone to the jury.

QUESTION: Yes.

MR. ELSEN: That it should have been dismissed on motion at the close of the government's case. Failing that, it should have been set aside at the end of the case.

Now, on the question of ambiguity, we do have some Circuit Court authority, which -- incidentally, I might start by saying that neither of these issues seem to, before, have been before this Court. We do have Circuit Court authority which says that an ambiguous question should not form a basis for a charge of perjury, where the answer to one possible meaning is truthful. We have Circuit Court authority supporting Judge Lumbard's opinion.

QUESTION: Mr. Elsen, --

MR. ELSEN: Yes.

QUESTION: -- am I right in thinking that both Judge Oakes and Judge Lumbard concluded the question was not ambiguous?

MR. ELSEN: That is correct. The entire Circuit was against us on this question.

But I think, in all fairness, Mr. Justice Rehnquist, that the court erred in that respect, and I urge that error before this Court.

The most thoughtful study of the whole law of perjury that we have uncovered is the comprehensive study of the American Law Institute, which is embodied in detailed comments to the draft of the Model Penal Code. That seems to be the

one place where not only the law is explored, but a detailed and careful examination of the rationale underneath the law is set forth. And on the question of ambiguity the American Law Institute says -- and I want to define the words "official interrogation" as they used it; that means interrogation under the Model Penal Code before an officer, a judge, a referee, and the like. That is the type of interrogation we have here.

The American Law Institute concluded --

QUESTION: What page is this on?

MR. ELSEN: That's at page 2 of our Reply Brief, Mr. Justice Powell.

"It does not seem unfair to require official interrogation to be sufficiently specific so that the verity of declarant's statements can be measured against something else than a guess as to how he interpreted the question." "Against something else than a guess".

The Sixth Circuit, in developing a related rationale, five years ago, said that you cannot have a fair test of the witness's belief in the truthfulness of his answer, where the question propounded admits of several plausible meanings.

Now, says the government, the ambiguity is eliminated by the question preceding the "Have you ever?" because it reads, "Do you have any bank accounts in Swiss banks, Mr. Bronston?"

Now, I would submit that you could ask Mr. Ford, "How many cars did you manufacture in June, Mr. Ford?" and that would not make it a question about personal activity.

QUESTION: Well, what do you say the first question was directed at, and what do you say the witness thought it was directed at?

MR. ELSEN: Well, what I say the first question is directed at is bank accounts; and bank accounts could be the property of the company, which was the subject of the examination, Mr. Chief Justice, or the individual, or the --

QUESTION: Do you think the first question was ambiguous?

MR. ELSEN: Yes, indeed, Mr. Chief Justice; I do, indeed.

This is in a --

QUESTION: I guess you say that because of the context --

MR. ELSEN: Yes, this is --

QUESTION: -- of an inquiry in the bankruptcy proceeding involving the corporation?

MR. ELSEN: Correct.

QUESTION: That's the premise of it.

MR. ELSEN: That is quite correct. That is the major premise of the entire ambiguity.

QUESTION: And what you say the fact was, the fact

was, at the time this question was, the corporation no longer had a bank account; is that correct?

MR. ELSEN: The corporation no longer had a bank account --

QUESTION: But did he?

MR. ELSEN: He no longer had a bank account.

QUESTION: -- at the time. So whether he took it as addressed to him personally, or as "you" meaning the corporation; in neither instance, the fact was that neither had a bank account at that time, is that right?

MR. ELSEN: That's quite correct.

QUESTION: So that was truthful in that respect?

MR. ELSEN: That is truthful.

But it also does not establish a context of inquiry into personal bank accounts.

I think I have suggested in my opening remark why it is that the witness could reasonably have reached this conclusion.

QUESTION: May I ask, Mr. Elsen, --

MR. ELSEN: Yes.

QUESTION: -- would you say that -- I gather your basic premise is that in this series of questions, wherever the interrogator uses the word "you", the inference ought to be that Mr. Bronston understood "you" to be the corporation?

MR. ELSEN: Well, I don't believe that I have to go

that far, Mr. Justice Brennan.

QUESTION: Yes. Because I was wondering about the last question: "Have you any nominees" --

MR. ELSEN: Well, companies could have nominees. As a matter of fact, that's a common practice of foreign corporations, to use nominees in Swiss banks in order to open up the, an account without having to comply with Swiss banking law for corporate resolutions and the like. It gets rather intricate. They often use individuals for that purpose. So that that very well could have been.

The point is we were dealing with an intricate s ituation. And the witness may have thought one thing, he may have thought the other. The point is, before we make this perjury, we should not have to guess. It's not fair. That's what the ALI says.

QUESTION: He took the stand, did he?

MR. ELSEN: At the trial?

QUESTION: Yes.

MR. ELSEN: He did not take the stand.

QUESTION: He did not.

MR. ELSEN: Did not take the stand.

There were witnesses from the company who testified t hat the account had not been kept secret. There was nothing chat the petitioner had to add to that.

There was no case but the fact that there was an

account, which he conceded at all times. As a matter of fact, the Swiss bank officer who testified for the government testified under -- with Mr. Bronston's permission, which we sent to Switzerland, because of the requirements of the Swiss banking laws.

So there is no dispute about the fact of this account. The question was what was going on during the interrogation.

Now I turn to the other horn of the issue. The question which starts with the assumption, which I submit is really unrealistic here, but starts with the assumption that the inquiry was clearly and unambiguously addressed to personal account.

And in that context we have an unresponsive answer, which the creditor's lawyer could readily have cured by asking a question: Have you personally ever had any Swiss bank accounts?

He could have insisted easily on a responsive answer if he wanted one. The referee was right there. The witness would have had to answer the questions, if the lawyer had wanted to ask them.

QUESTION: Does the referee have the sort of contempt power that a district court would have in a case of a genuinely obdurate witness?

MR. ELSEN: Oh, yes. I think that the referee has

to invoke the aid of the district court, but there's no --

QUESTION: Could he, on the spot, say "Either answer the question or" --

MR. ELSEN: Oh, he could direct him, yes. The referee will direct, "You answer that question".

QUESTION: But if the man doesn't, in response to the referee's direction, then the referee must seek the aid of the district court?

MR. ELSEN: I believe that's the law, Mr. Justice Rehnquist. But, nevertheless, may I say that the atmosphere of the referee's court is a courtroom, and the obdurate witness is a rare sight, a rara avis, indeed, who will quarrel with that referee sitting on the bench.

And I might also point out that the right of counsel is not generally recognized. The witness doesn't -- if he oesdnot have a lawyer, he has the right to get up and say, "I object." A witness who is on his own.

Now, there was a lawyer sitting there for part of the hearing, but the referee made it clear what the practice is in the bankruptcy court.

We do not make an issue of this point, because I think that there is -- the issue that we raise here has to do with interrogation; but that is part of the setting.

QUESTION: What was it, the significance of whether or not he personally had a bank account, what did you say, four

years earlier or something?

What was the significance of that?

MR. ELSEN: You mean why do we concede materiality? That's really --

QUESTION: Yes.

MR. ELSEN: We conceded materiality because the law is extensive, that in a bankruptcy, we will not dispute the fact, you could have asked about just about anything that he had done during a period of --

QUESTION: I mean was the estate in any way disadvantaged?

MR. ELSEN: No. No. No, there wasn't a nickel to be had, or the estate in any way to be affected by the answer to a question about this personal bank account; and no one has ever taken any action as a result of the disclosure of the transcript of this account, which was procured in response to his waiver of bank secrecy.

So that it has had no effect. But we have not argued the question of materiality simply because of the law in this area, it is against us on that question, and we do not dispute it.

Now, I would like to point out, before I sit down, the broad sweep of a rule that would permit a criminal conviction for a truthful but nonresponsive answer.

Because the nonresponsive question occurs every day

in the law. The most honest witness who is being examined in pretrial depositions, the witness who does not want to volunteer about his other business affairs, about his friends' lives, about his private life, and who will wait until he is pushed, that witness comes up all the time.

Now, you may say in a pure, platonic society, maybe we shouldn't be that way; but that's the way the real world is, and I think that we all know that from our experience at the bar. This goes on constantly.

And witnesses sometimes don't know why the lawyer doesn't press him. The witness -- the lawyer may shift his interest, he may decide to use a different line of inquiry, or he has what he wants, he doesn't want to get into a dispute over a point, he doesn't want to go down to court to get a ruling. So he lets the matter drop.

But if the rule is that a truthful but unresponsive answer constitutes perjury, then every time the questioner leaves the unresponsive answer on the question, you have a prima facie case of perjury.

Now, that is the most disturbing aspect of this entire case.

QUESTION: And yet, certainly, if it were a civil fraud action, this type of answer would support a judgment for civil fraud.

MR. ELSEN: I would not concede that, Mr. Justice

Rehnquist, but I would draw this distinction, and the ALI draws this: In a civil fraud action, the actor, the person making the statement, controls the framing of the representations.

If I'm selling you stock, and I give you a prospectus, you cannot ask me the next question.

QUESTION: No, but if I'm interrogating you orally about what kind of a stock it is, I certainly do ask the question.

MR. ELSEN: Well, the normal civil fraud situation arises out of representations where the actor controls the representations. And the American Law Institute, in the Model Penal Code, does say that there should be a stricter standard for that type of situation than for the interrogation situation where counsel is in a position to frame the issues, to ask the next question, and to pursue.

And I would say, though I certainly do not say that this is a fraud, particularly in the light of the nature of the questioning here and the nature of the economic interests that were involved here, where there was indeed no motive, that if we assume all those things that I have assumed to reach this point in the discussion, nevertheless, a truthful but unresponsive answer put so broadly that it would -- a rule of this sort would either be unenforced, thus inviting disrespect for the law, or it would be enforced most frequently

against those in disfavor.

Now, the Model Penal Code deals with an analogous issue, it is not an identical issue, but it raises the same policy problem, in its treatment of the Remington type problem, the problem arising from United States vs. Remington, where the ALI says:

"The likelihood of achieving moral reformation by imprisoning one who has, objectively, told the truth is not high. Encouraging the police to inquire as to subjective dishonesty behind the objective truth would not only waste their time, but opens substantial possibility of abuse."

Now, I see -- I would like to reserve the balance of my time for rebuttal; but I would like to simply make one point --

MR. CHIEF JUSTICE BURGER: Well, you have only two minutes of it left, so you'd better make that judgment.

MR. ELSEN: Well, then I will simply say this: This is not a case involving material omissions, either, Mr. Justice Rehnquist. We do not have to reach that point.

Now, at 124 to 5 of the Model Penal Code comments, the ALI advocates a very restrictive rule on perjury in the interrogation situation, and that's what the government purports to answer in its brief. It deals with the question of material omission.

But here we have a situation where the questioner

does not get an answer that purports to be complete, like "Who was at the meeting? Jones and Smith, or Jones and Robinson."

The question is like the analogy given in our brief, "Jones and Robinson were the only black men at the meeting." The question is, if you want to know who every one else was, "Who were the white men at the meeting?"

It's only to a class of those within the general question. The questioner is not put off, and he should ask the next question.

If you reach the question of material omissions, I do submit that in interrogation the issue is different than in fraud, but we need not reach that. That I think is important.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FREY: Mr. Chief Justice, and may it please the Court:

The central issue in this case is whether a witness who, knowingly, wilfully, and with the intent to deceive and conceal, gives sworn testimony which, considered in the context in which it was given, constitutes a falsehood by implication, can escape punishment for perjury on the ground

that the words that he uttered were literally or technically truthful, when considered in isolation.

Now, I'd like to begin with what the jury necessarily found when it convicted petitioner in this case.

Judge Tenney's charge to the jury was, we believe, a model of clarity and of precision, and we have set forth the relevant portions of it in Appendix B to our brief. Judge Tenney made it quite clear to the jury that they had to find beyond a reasonable doubt that the petitioner understood the question, that his response to the question was not inaccurate as a result of haste, inadvertence, misunderstanding, confusion, negligence, or any honest error on his part.

QUESTION: Would you say, Mr. Frey, that the majority of the Second Circuit in this case read this answer to Question No. 2 as though he had said, "No, but my company did"?

MR. FREY: Yes. I think that this --

QUESTION: You have to read that "no" into it, don't you?

MR. FREY: Well, I think that's true. Now, we don't have to read that in as a matter of law, because this is an issue, as I am trying to point out here, the jury did resolve.

QUESTION: Well, the Second Circuit is treating the answer given as though; do you agree that that's the way they are treating it?

MR. FREY: Yes, I do agree, Your Honor.

When --

QUESTION: You say that's the necessary implication, the inevitable implication?

MR. FREY: That's what the jury found, because the judge instructed them, apart from the question of understanding, that they must find that he made a statement which, when considered in the entire context, was a false statement. And he further instructed that they must find beyond a reasonable doubt that he made the statement with an intent to deceive.

So that when the jury convicted petitioner, the jury necessarily found that he understood the question, and they necessarily found that his statement "The company had an account in Zurich for about six months" was of the same effect and had the same meaning, in the context, as if he had said "The company had an account in Zurich for about six months, and there were no other accounts."

That's what the jury found.

QUESTION: Well, that's not really a final answer, is it?

MR. FREY: Well, there is a question, of course, as to whether the jury could properly find that, under the --

QUESTION: That's right, --

MR. FREY: -- under the evidence in this case.

QUESTION: -- juries find lots of things; lots of jury verdicts are upset, aren't they?

MR. FREY: That's correct, Your Honor.

QUESTION: Even though the instructions are proper?

MR. FREY: That may be true, if there's an error in --

QUESTION: Well, it is true, isn't it?

MR. FREY: Yes. If there's an error in submitting the case to the jury. We don't believe there was such an error in this case.

Basically, petitioner's arguments fall into two categories. The one group of arguments are those that say the case should never have gone to the jury. The second group are those that say all of this may be true, what the jury found may be true; it may be true that this was a lie by negative implication. But that's not enough as a matter of law, and the judge was in error when he charged the technical truthfulness is not sufficient.

I'd like to take up first the ambiguity point that Mr. Elsen discussed, which is basically a question of whether it was proper to submit this issue to the jury.

Now, I point out that in addition to the jury none of the judges below had the least difficulty with this contention. They were all satisfied that the word "you" as used in the context of these questions at least called for information about the petitioner's personal accounts.

Now, in our view, looking at the context of the

proceeding, it was logical to assume that it called for information about both personal and corporate accounts. But, in any event, we do not believe that it can be construed as calling for information only about his corporate accounts.

I think perhaps I can illustrate that point for you by a hypothetical. Suppose the company had had no accounts in Switzerland at any time; there had been only petitioner's personal account. And he had been asked these very questions that he was asked, and in response to the question "Have you ever had a Swiss bank account?" he had simply answered no.

Now, I don't think it can seriously be contended that that response would have been nonperjurious in view of the existence of his personal Geneva account.

Yet, if the ambiguity argument, as a matter of law, holds water, then that response -- the question was still ambiguous and you couldn't go to the jury even if he had said no in those circumstances.

Now, I think if you look at the context of this proceeding and of the questions, there was evidence from which the jury could reasonably infer that the word "you" referred to petitioner's personal accounts.

First of all there is the wording of the question itself, the normal meaning of those questions, it seems to me, is that "you" is "you, Mr. Bronston".

Now, petitioner says: Well, but this was a

bankruptcy arrangement proceeding for Mr. Bronston's wholly owned corporation.

That's true. However, the nature of this proceeding is one in which the creditors are trying to discover and marshal the assets of the company in order to be sure that the creditors' claims are going to be satisfied, that there has been no improper diversion of company assets into friends' or into the personal hands of the sole owner of the company.

So it's highly material. It's not just material as a technical matter, but it's highly material to the bankruptcy inquiry to determine petitioner's individual finances, to see whether there is money that is in his personal possession which properly belongs to the corporation and should be reachable by the creditors as part of the arrangement.

Now, the evidence in this case, the account had been closed and it has never been established that there was bankruptcy fraud by petitioner. However, in the setting of this situation, I think it's quite clear that the questions were addressed to his personal account.

Now, one other point in this connection, --

QUESTION: At tht point, Mr. Frey, what could he possibly have gained by the type of answer he gave, if it were perjurious?

MR. FREY: Well, first of all, he deflected inquiry into this account through which $180,000 had passed, which he

used for mixed business and personal purposes according to the testimony at the trial in the perjury case. I can't tell you what, specifically, he would have gained.

What I can tell you is that it's possible that either there were or he thought there were some improprieties in that personal account which would have been revealed --

QUESTION: Well, I gather, Mr. Frey, that certainly this bankruptcy estate suffered none at all by anything that he said.

MR. FREY: Well, it hasn't been proved that he suffered by it. The fact is that no inquiry was made into the Geneva account. Had he mentioned the Geneva account, I think it's quite clear that an investigation of that --

QUESTION: Well, I thought all of the facts regarding those accounts, what was in them, how long they'd been open, when they were closed, that they all were finally developed at the perjury trial. Am I wrong about that? Both the corporate and personal accounts.

MR. FREY: Well,the personal account ledger was introduced, and there was evidence regarding some of the transactions, there was some evidence that the government sought to introduce regarding an unexplained series of transactions involving a $25,000 payment from the company to a Liechtenstein corporation called the Dorchester Establishment, which, five weeks after, paid $20,000 into this personal

Geneva account. Now, that evidence was introduced and was before the jury when Mr. Elsen sought to rebut that evidence by putting in explanatory evidence. There was a conference at the bench, as a result of which the matter was dropped and the government did not argue to the jury.

And I can't say to you that there was any impropriety in this transaction. But what I can say is that it's very possible that Mr. Bronston thought there was something about that account that he didn't want to have these people snooping into. It was a substantial account; $180,000.

Even though it was closed now, assets can be traced from account to account.

Now, we will agree that there are circumstances in which a question can be so ambiguous that as a matter of law you can't ask the jury to find whether the defendant understood the question. An example of that would be the Lattimore case, where he was asked if he was a follower of the Communist line, and in reversing his perjury conviction it was stated -- properly, I believe -- that the jury shouldn't be allowed to speculate on what such a vague term may mean.

In the Cobert case, he was asked about a "listing post", and the indictment didn't indicate what a listing post was, or that he had an understanding of what a listing post was.

We don't have that kind of a problem here. Everybody knows what a bank account is, and I think we know what "you" is. It's not -- it doesn't suffer from that kind of ambiguity.

Finally, a point that I think you brought out earlier, Mr. Justice White: Petitioner's argument is completely theoretical. He's saying this is ambiguous as a matter of law. He never got up on the stand and said, "I didn't understand the question." At no point has he introduced evidence to that effect. We're dealing with --

QUESTION: But part of his argument, I take it, is that even if the witness clearly understood it, all he did was fence with the lawyer.

MR. FREY: Well, --

QUESTION: In the sense that a lot of witnesses just naturally fence with lawyers; they don't know where the lawyer is going with questions -- all the questions that they can avoid answering, they try to avoid answering.

And so he said, "Well, my mother had an account" or "my company did"; he just didn't answer the question.

MR. FREY: Well, --

QUESTION: And your argument has to be that any time that somebody gives an evasive answer, a jury is entitled to find that the negative implication was that he really intended to answer the question falsely.

MR. FREY: No, I don't believe my argument has to be that, at all. I'll turn to that point now.

QUESTION: Well, it does if you -- any time the jury found it, you would sustain it.

MR. FREY: No, I would not. Let's take Judge Lumbard's example in his dissenting opinion. He says: Suppose petitioner had answered the question by saying, "My daughter went to school in Switzerland"? Well, he says, this is an unresponsive answer. He says, it's very similar to the answer he gave, at least he just changed -- the difference is a matter of degree.

QUESTION: Yes, but if it went to the jury and the jury found it, what would you say?

MR. FREY: No, I would say it could not go to the jury in tht case. And the reason it could not go to the jury is that the answer, "My daughter went to school in Switzerland", does not contain any implication about bank accounts, one way or another. It cannot be uderstood to be a denial of the existence of any bank accounts.

But the answer, "The company had an account in Zurich, for about six months" can be understood, and the jury took it to mean that was the only account,there were no other accounts.

And our case does depend upon that implication, that we say the jury could properly find was inherent in his

answer. But not just any unresponsive answer would expose the witness to perjury.

QUESTION: But the essence of what you've responded to there suggests that you can be found guilty of the criminal act of perjury by implication.

MR. FREY: Yes, indeed. By -- if your statement contains with it an implication, as many statements do, the question is: what did you intend to convey, and what did you convey?

The question is: should we look just at the literal words, should we parse them as narrowly as possible, or should we look at the meaning? May the jury say, "Yes, in this context, we find that when he said these words he meant to deny the existence of the Geneva account." Because that is what they found.

And we say that if that's the meaning, even though the meaning is not part of the literal, technical parsing of his dry words, he still can be held accountable for that misstatement.

QUESTION: Mr. Frey, I don't know that it makes any difference, but were these questions asked by the referee in bankruptcy or by counsel for one of the claimants?

MR. FREY: They were asked by counsel for one of the principal creditors of the corporation.

Now, we believe that the position that petitioner

has taken is directly contrary to the basic purpose of the perjury statute, which has as its central concern protecting the integrity of the fact-finding process.

They dismiss, and Judge Lumbard dismisses the factor that the inquiry is frustrated and misled as being not material; but we think that it's the very evil at which the perjury statute is really aimed.

Now, --

QUESTION: Yes, but that excuses pretty easily the failure to -- not to ask another question.

MR. FREY: Well, it's easy for us to stand here now, knowing about the existence of the Geneva account, and looking back on the matter --

QUESTION: But normally since he didn't -- you don't have to know that to wonder why the lawyer didn't ask another question at the time.

MR. FREY: Well, because I think the lawyer understood petitioner's answer the way the jury understood petitioner's answer, to deny the Geneva account; and therefore it was fruitless to ask another question. He already had the information he was seeking.

QUESTION: Well, Mr. Frey, I think to most everybody who has practiced law your first reaction to that set of questions is, you know, if you had been the examining attorney and gotten an answer like this, you would have said, "Yes, but

how about your own account?"

I don't think you have to know the existence of the Geneva account to feel that the answer is almost a red flag to any lawyer who is paying attention to the examination.

MR. FREY: Well, I don't believe that's so. We're dealing here with a very experienced and capable New York lawyer who did not ask the next question. Now, I can't say why he didn't ask the next question, but it does seem to me that he had an answer which seemed to answer his question in its entirety.

That is, the answer, "The company had an account in Zurich for about six months" suggests that that was the only Swiss bank account that existed.

QUESTION: In bankruptcy cases when there's some thought perjury has occurred, who makes the decision to prosecute?

MR. FREY: I think the United States Attorney would make this decision.

QUESTION: This isn't something that would have to come to the Department of Justice?

MR. FREY: I'm not certain of that; I'm not certain.

In this case, I believe the information was provided by the creditor whose attorney had been asking the questions to the United States Attorney.

QUESTION: Isn't it also true that in a bankruptcy hearing it's a complete fishing expedition, you can ask anything you want to ask?

MR. FREY: That is true. In fact, the --

QUESTION: And that's in the light of this lawyer who could have asked any question following this up; couldn't he?

MR. FREY: Well, but this wasn't just any line of questioning, Mr. Justice Marshall. This was questioning which was going to something which was --

QUESTION: But I'm saying there are no restrictions at all on the lawyer getting the facts, if he knew how to get them?

MR. FREY: Oh, that's true. He could certainly have asked -- he could have repeated the question with different wording. He could have said: "Yes. What about your personal accounts, did you have any of those?"

He could have done that; there's no question.

The questioning that immediately preceded the Swiss bank account questioning concerned Mrs. Bronston's jewelry, truly a personal matter, and immediately following that into the Swiss bank account questioning.

Now, we think that while the policies are not the same where you're dealing with criminal fraud or extortion, there is a general principle of American jurisprudence that

you look at statements in the context in which they're uttered, you give them the meaning that the context suggests that they convey. You don't look at them strictly in terms of the literal words.

We think the same policy ought to apply in the perjury area as applies in civil areas and in other areas of criminal utterance.

QUESTION: Well, that would be very persuasive to me if this were a verdict in a civil case, as Justice Rehnquist suggested, a verdict in a civil case for fraud, and the jury then returned a verdict treating this as a fraudulent answer, a dishonest answer. Don't you have a different standard when you're dealing with the perjury case.

MR. FREY: Well, I think if this were a criminal fraud case it would also be true that you would look at the context of the statement, and we have cited cases in our brief to that effect.

It's true that --

QUESTION: Well, I was putting it another way, that I think an appellate court would have very little difficulty affirming a judgment in a civil fraud case with this structure of questions and answers. But that doesn't carry you all the way in a criminal case, does it?

MR. FREY: No, I'm not suggesting that automatically the same policy would apply to perjury. There are different

considerations. But I am saying that what the dissent in the Court of Appeals proposed was that we simply look at the words in isolation from the context in which they were spoken. If those words are literally true, the inquiry is at an end.

Now, I'd like to touch briefly on the hypotheticals which we in our brief and petitioner in his reply brief have brought out.

I think that one can readily see that literal truthfulness should not be a total defense to a perjury charge. From the example of the question, "Who was at the meeting of June 1?" and the response, "Smith and Brown." When, in fact, Jones and Robinson were also at the meeting.

Now, the response, "Smith and Brown" is literally truthful. You could of course ask another question: "Anyone else?"

But the response, "Smith and Brown" in the context can suggest that that's a total answer.

QUESTION: Well, you could start out with a good question in the first place: "Name everybody who was at the meeting."

MR. FREY: Well, you could do that, that's right, Mr. Justice Rehnquist, and I think that -- I would concede that the inquiry here was not the most skillful that one can imagine, but the question is whether the witness, who has spoken falsely, should be relieved of the onus of his offense by

virtue of the ineptitude of counsel who asked him the question.

This witness understood what the question called for. He gave an answer which was designed to, and which did, convey false information, denying the existence of the Swiss bank account.

QUESTION: Well, I get what you say, but it may be quite true that he thoroughly intended to conceal the fact that was asked; you wouldn't say that's equivalent to -- if he successfully conceals it, is that equivalent to perjury?

MR. FREY: Well, it depends on how he does it, of course, and only if he conceals it by a false statement would it be perjury. But our contention is that that is what he did here.

He could simply have answered the question "Yes"; I mean, that would have been a completely satisfactory and non-perjurious answer and would have put the ball back in the court of the person asking the questions.

Instead, he chose to answer in a manner which implied the non-existence of this personal Geneva account.

QUESTION: Well, I suppose part of the problem is that on the day that the creditor's counsel was asking these questions he wasn't thinking about a perjury case in federal district court, a criminal prosecution. Now we're here, and we must think about it.

MR. FREY: You say petitioner wasn't thinking about it, or --

QUESTION: No, no, I said the creditor's counsel.

MR. FREY: That's probably true, he wasn't, --

QUESTION: The creditor's counsel was just making a general inquiry, he wasn't undertaking to cast his questions in the precision of a criminal prosecution.

MR. FREY: Oh, that's true, but here he was dealing with a witness who had come in as, in effect, a plaintiff asking relief of the court for his corporation, asking the bankruptcy court and asking his creditors to participate in an arrangement. He was dealing with a witness who had unique possession of the information that was necessary to be developed for the sake of assuring that the arrangement that would be arrived at would be fair to the creditors.

The lawyer, since this was a discovery type of proceeding, he didn't already have this information, he didn't know the answers, he didn't know about the existence of any Swiss bank accounts, one way or the other. This was information that Mr. Bronston knew of. And Mr. Bronston was therefore in a position where he could, much more easily, mislead the inquiry than you would be at a trial where, of course, in many cases the lawyers already know the information and their problem is to bring it, develop it for the fact-finder.

Here you have a discovery proceeding, and the Court of Appeals, in their opinion, emphasized the particular importance.

It would also be important in grand jury proceedings, which are discovery proceedings in the criminal area; a witness is to be free to give any kind of answer so long as it's literally truthful, no matter how misleading it is, no matter what implications it carries, no matter to what extent it deflects the grand jury's inquiry.

QUESTION: Well, they may not be free to do that, but that doesn't mean they're guilty of perjury every time they do it. They may not be free to do it in the sense that the lawyer can ask him another question, and if they refuse to answer they will go to jail.

MR. FREY: If the lawyer sees that he's been -- that he is or may have been lied to. But it's --

QUESTION: Well, it wouldn't take much in this case, would it?

MR. FREY: Well, I think that -- again I have to come back to what I think the -- what the jury found petitioner's statement to mean, which was that he had already denied the existence of this account. I mean, in my example of --

QUESTION: Well, I agree the jury must have found that, that he intended to tell a lie.

MR. FREY: In my example with the persons at the

meeting, where the answer is "Smith and Brown", and which I believe the petitioner concedes is perjurious in that context, although I think Judge Lumbard would not find it to be; you would agree that all you have to do is ask "Anyone else?" and you could bring out the rest of that information. Yet the answer suggests no one else, and if the answer stands, no one else is the answer to which the witness is held.

Now, the difference in the example that petitioner has used in his reply brief, as he says, that the answer had been "Smith and Jones were the blacks at the meeting", that would not be perjurious.

We agree. That would not be perjurious. The example is inapt, however, for the reason that the statement "Smith and Jones were the blacks at the meeting" carries with it no implication denying the presence of other persons at the meeting. On the contrary, it implies that there were other people at the meeting.

Now, if this answer had implied that there were other bank accounts, we wouldn't be here today, because we would agree that there would be no perjury charge to submit to the jury.

If this answer had been completely unresponsive, like the daughter going to school in Switzerland, there would be no negative implication, no false statement contained.

Now, there is one matter that I would like to call

to the Court's attention that's come to our attention in the course of preparing for the argument. The opinion of the Second Circuit speaks about the whole-truth principle of the oath, and in a footnote they state: "It may be deduced from these orders and forms and the purpose of the Act that an oath given in a bankruptcy proceeding basically takes the same form, and has the same legal consequences, as an oath composed of the traditional words of 'truth, the whole truth, and nothing but the truth'."

QUESTION: What page is that on?

MR. FREY: That is in the cert petition at Appendix page A8, footnote 4.

QUESTION: Thank you.

MR. FREY: I have been advised by Referee Ryan that the form of oath that he uses is an oath as follows: "Do you swear that the evidence that you shall give in this proceeding shall be the truth, so help you, God?"

Now, therefore, the Court was wrong in surmising that the -- in form the oath contained an explicit reference to the wholte-truth principle. In our view, however, this makes no difference, when a witness takes his oath to tell the truth he's bound to tell the truth, and we say that Mr. Bronston didn't do it.

In closing, it's our contention that petitioner's position would constitute an open invitation to the clever

witness seeking to conceal the truth, to engage in half-true, evasive and deceptive answers. In short, to subvert the integrity of the fact-finding process with impugnity so long as he can be literally or technically truthful.

The principle that the Court lays down in this case will not apply solely to bankruptcy proceedings, because we're engaged in an interpretation of the federal perjury statute. A reversal of petitioner's conviction would suggest that the same sort of deceit and falsehood by negative implication that would go unpunished here could be resorted to by a witness in a criminal case, where a man's liberty may be at stake.

We don't believe it's too much for the sake of the integrity of the federal fact-finding process to require witnesses to be truthful, not just in the narrow, technical sense of the literal meaning of their words, but in the broader sense of the true meaning of the words in the context in which they're uttered.

Accordingly, we submit the conviction should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Frey. Thank you, Mr. Elsen.

The case is submitted.

[Whereupon, at 11:01 o'clock, a.m., the case was submitted.]