No. 05-916

In the Supreme Court of the United States

JOANNE RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's pretrial motion for a continuance tolled the time for trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

2. Whether petitioner's conviction for making false statements to a grand jury is barred by *Bronston* v. *United States*, 409 U.S. 352 (1973).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-51) is reported at 421 F.3d 17. The memorandum opinion of the district court (Pet. App. 53-60) is reported at 324 F. Supp. 2d 339.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2005 (Pet. App. 52). A petition for rehearing was denied on October 25, 2005 (Pet. App. 61-62). The petition for a writ of certiorari was filed on January 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was

convicted of making false statements to a grand jury, in violation of 18 U.S.C. 1623. She was sentenced to six months of imprisonment, to be followed by two years of supervised release, and a $3000 fine. The court of appeals affirmed.

1. From about 1997 until 2000, petitioner was a regional account manager for TAP Pharmaceuticals Inc. (TAP), which manufactures Lupron, a prescription drug used in the treatment of prostate cancer. On October 31, 2000, and December 19, 2000, petitioner testified before a grand jury that was investigating allegations that TAP provided educational grants, free items, and other things of value to its customers in order to induce them to purchase or prescribe TAP products while obtaining a hidden discount, which facilitated their payment of reduced rebates to state Medicaid programs. Pet. App. 2-3. Petitioner denied that she ever offered or discussed offering things of value to Lahey Clinic "as a way of reducing [Lupron's] price outside of a contract form." *Id.* at 3.

The indictment alleged that petitioner made 19 false statements during her grand jury testimony. Pet. App. 4. The following exchange accounted for two of the false statements:

> Q. Did you ever do that with Lahey Clinic? Offer them educational grants to reduce the price on a contract?
>
> A3. No I did not.
>
> Q. Did you ever discuss that with them?
>
> A4. That customer had brought up some things that they would do, and it would be included in the

> contract, in order to bring the price closer together, but we did never do that.

Id. at 45.

2. On October 31, 2002, a grand jury returned a superseding indictment against petitioner. On March 7, 2003, petitioner moved to dismiss the indictment. On August 11, 2003, without ruling on that motion, the district judge recused himself. On August 13, 2003, the case was reassigned to another judge, who also recused himself. Pet. App. 3-5.

On September 22, 2003, petitioner asked for a trial date, and argued that the 70-day time limit of the Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161 *et seq.*, was about to expire or had expired. The court stated that except for the week of October 14, 2003, its calender was booked through January. After petitioner recognized that the court would not have sufficient time to decide her motion to dismiss before October 14, 2003, the court declined to set a trial date at that time. Pet. App. 5.

The court denied petitioner's motion to dismiss on October 16, 2003. On November 17, 2003, the government requested a trial date of January 19, 2004, because a government attorney assigned to the case had an ongoing trial that was expected to last through part of December. The court noted that it also had trials scheduled for December. When petitioner requested an immediate trial and the court indicated that it might have to reassign the case to another judge who could try the case sooner, the government objected because reassignment would likely cause further delay. The court directed the government to report by noon the next day on the speedy trial status of the case, so that the court could decide whether the earliest available trial date of

January 19, 2004, would satisfy the STA or whether the case would have to be assigned to another judge. Pet. App. 5-6.

On November 18, 2003, the government filed a "Motion to Set a Trial Date of January 19 and for Excludable Delay for the Period Between November 17, 2003 and January 19, 2004." The motion reported that, absent action by the district court, the 70-day STA clock would expire on December 18, 2003. The motion then sought a continuance until January 19, 2004, as well as exclusion of the resulting delay from the speedy trial clock pursuant to 18 U.S.C. 3161(h)(8)(A), which authorizes courts to grant continuances and exclude the resulting delay if doing so would further the ends of justice. The motion listed three grounds for the continuance: (1) an earlier trial date would deny the government continuity of counsel; (2) the government expected that both sides would file pre-trial motions that would take time to consider, and requiring the parties to file those motions by November 24, 2003, would toll the STA clock under 18 U.S.C. 3161(h)(1)(F); and (3) any transfer would likely result in a miscarriage of justice by causing further delay. Petitioner opposed the government's motion. On December 1, 2003, without deciding any STA issues, the district court transferred the case to Judge Young. Pet. App. 7-10.

On December 1, 2003, the district court advised the parties that it could begin jury selection on December 8, 2003, but that the court's schedule would not permit an uninterrupted trial that week. The parties agreed on a trial date of January 12, 2004, and also agreed to exclude the time between December 8, 2003, and January 12, 2004, as an ends-of-justice continuance under Section 3161(h)(8). On December 3, 2003, the government filed

a pretrial motion in limine. On December 16, 2003, petitioner moved to dismiss the indictment under the STA. On January 12, 2003, the court denied that motion and began trial. Pet. App. 10-11, 53-60.

The court held that although petitioner had argued that the speedy trial period expired on November 20, 2003, the government's November 18, 2003, motion for an ends-of-justice continuance tolled the STA clock until December 1, 2003, when the district court implicitly denied that motion by reassigning the case to another judge. Pet. App. 57-58. The court explained that the STA "provides that 'delay resulting from *any* pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion' is excludable from" the STA clock. *Id.* at 58 (quoting 18 U.S.C. 3161(h)(1)(F)). Rejecting petitioner's argument that the government's motion was a mere status report and not a motion at all, the court emphasized that the government's motion was valid "on its face" because it requested a continuance until January 19, 2004, set forth reasons why the case should be continued, and cited supporting legal authority. *Id.* at 58-59. Finally, the court found that because only one relevant day passed after December 1, 2003, the speedy trial time stood at 68 days when the trial began, such that there was no violation of the STA's 70-day clock. *Id.* at 60.

At the conclusion of the trial, the court instructed the jury that to be guilty of making a false statement to a grand jury, petitioner had "to know what she's being asked, and then she's got to know that the answer she gives is not literally true." Gov't C.A. Br. 49. The court further instructed the jury that to convict, it had to find unanimously that the same statement amounted to per-

jury beyond a reasonable doubt. Pet. App. 21. The jury found petitioner guilty of making a false statement to a grand jury, in violation of 18 U.S.C. 1623, and acquitted her of an obstruction-of-justice charge. Pet. App. 11. At sentencing, the district court emphasized that "I want you to be crystal clear that the jury's finding was in the eyes of this Court manifestly correct beyond a reasonable doubt. [Petitioner] lied before the grand jury knowing what she was doing." Gov't C.A. Br. 30.

2. The court of appeals affirmed. Pet. App. 1-51.

a. With respect to the STA, the court explained that "[t]he parties' disagreement is * * * confined to the question whether the government's filing of November 18, 2003 was a 'motion' within the meaning of 18 U.S.C. § 3161(h)(1)(F)." Pet. App. 14; see *id.* at 14 n.10. After explaining that it had read the term "motion" broadly, the court concluded that "[t]he district court accurately characterized the government's November 18, 2003 filing, which not only reported the government's calculation of the number of days remaining on the speedy trial clock but also sought relief in the form of a continuance in the interest of justice pursuant to 18 U.S.C. § 3161(h)(8)(A), as a motion that tolled the speedy trial clock pursuant to 18 U.S.C. § 3161(h)(1)(F)." *Id.* at 16-17.

The court also ruled that "[t]he record in this case supports [the district court's] determination that the government's facially valid motion was not filed as a pretext to avoid the consequences of an STA violation, but was filed for the legitimate purpose of seeking a continuance in the interest of justice." Pet. App. 18. "In particular, the motion justifiably sought a continuance to prevent the loss of continuity of counsel in the event the case was reassigned to a different judge for an earlier

trial date." *Ibid.* Rejecting petitioner's argument that the real reason for the filing was the district court's inability to try the case before January, the court of appeals stressed that even *before* the parties performed their speedy trial calculations, the government notified the court that one of the attorneys assigned to the case would not be available until January 19, 2004. *Id.* at 19. "Given the circumstances," the court of appeals held that "the district court committed no clear error in determining that, despite the timing of its motion, the government legitimately sought relief from having the case reassigned to a different judge in the form of a continuance in the interest of justice." *Id.* at 20.

b. The court also rejected petitioner's contention that some of her statements were not culpable as a matter of law because they were literally true under *Bronston* v. *United States*, 409 U.S. 352, 353 (1973), which holds that a statement that is "literally true but not responsive to the question asked and arguably misleading by negative implication" is not perjurious. Pet. App. 24-25. The court held that the *Bronston* rule does not apply to this case because there is no dispute about whether petitioner's statements were arguably misleading by negative implication; instead, the question is whether her statements were "in direct conflict with the facts." *Id.* at 25.

On that question, the court explained that although petitioner argued that some of the questions were ambiguous, the questions were at most arguably ambiguous, not fundamentally ambiguous, and the truth or falsity of petitioner's answers was therefore a question of fact for the jury. Pet. App. 26-33. With respect to Answers 3 and 4, for example, the court held that the prosecutor did not ask a fundamentally ambiguous question

by using the term "on a contract" instead of "outside a contract." *Id.* at 32. In context, the court reasoned, the "prosecutor's questions continue a line of inquiry into whether TAP provided financial support to Lahey Clinic that was not listed in the written contract but was nevertheless part of the parties' agreement regarding the clinic's Lupron purchases." *Ibid.*

Finally, the court noted that petitioner "does not challenge the sufficiency of the evidence supporting each of the nineteen false statements charged against her," and therefore "forfeited any argument that not one of the nineteen charges against her is supported by adequate evidence." Pet. App. 33. Nevertheless, the court "readily conclude[d] that the evidence was sufficient." *Ibid.* The court explained that a reasonable jury could have found that petitioner knew that "the things of value that she offered or discussed offering to Lahey Clinic, and that she discussed with other TAP employees, were intended to provide the clinic with a hidden discount or incentive to renew its contract for Lupron, contrary to [petitioner's] statements" to the grand jury. *Id.* at 34.

ARGUMENT

1. Petitioner contends (Pet. 10-18) that the government's November 18, 2003, filing was not a "motion" that could toll the speedy trial clock under 18 U.S.C. 3161(h)(1)(F). The court of appeals' decision on that fact-bound issue is correct and does not warrant review.

a. The STA requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the computation of the 70 days are periods of delay resulting from various events, including "delay resulting from any pre-

trial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F).

In addition, any "period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government" is excludable "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8)(A). In determining whether to grant ends-of-justice continuances, courts are to consider a variety of factors, including whether denial of a continuance would "unreasonably deny the defendant or the Government continuity of counsel." 18 U.S.C. 3161(h)(8)(B)(iv).

b. Because Section 3161(h)(1)(F) broadly excludes delay resulting from "any" pretrial motion, without limitation, the court of appeals correctly held that the government's motion for a continuance tolled the speedy trial clock. See, *e.g.*, *United States* v. *Oakley*, 944 F.2d 384, 388 (7th Cir. 1991) (motion for continuance tolls the STA clock), cert. denied, 503 U.S. 949 (1992); *United States* v. *Darby*, 744 F.2d 1508, 1518 (11th Cir. 1984) (same), cert. denied, 471 U.S. 1100 (1985). The motion did not lose its character as a motion merely because it *also* complied with the district court's order for an update on the speedy trial status of the case.

Petitioner's contention (Pet. 18) that the government filed the motion as a pretext to avoid the consequences of an STA violation lacks merit. The court of appeals held that the district court's contrary finding was not clear error, and this Court does not ordinarily review factual determinations of two lower courts. See, *e.g.*,

Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

In any event, both lower courts correctly determined that the motion was a legitimate one. The motion expressly sought relief in the form of a continuance and a corresponding exclusion of time, it cited 18 U.S.C. 3161(h)(8) as the legal basis for that request, and it argued that a continuance was warranted for three reasons, including continuity of counsel, which 18 U.S.C. 3161(h)(8)(B)(iv) expressly sets forth as a valid reason for an ends-of-justice continuance. Pet. App. 15, 57-60. In addition, as the court of appeals noted, the government had assigned counsel to this case before the speedy trial issue arose, and it informed the court of the continuity-of-counsel issue before the court asked the government to submit a speedy trial calculation. *Id.* at 19. Thus, there is no warrant for finding clear error in the district court's finding that the motion was not pretextual.

The court of appeals' decision does not conflict with *United States* v. *Brown*, 285 F.3d 959 (11th Cir. 2002). In that case, the Eleventh Circuit held that "a document that does *nothing more* than remind the court that it must set a case for trial * * * is not a motion within the meaning of 18 U.S.C. § 3161(h)(1)(F)." *Id.* at 962 (emphasis added). Here, the government requested more than a trial date—it also requested a continuance and exclusion of time under Section 3161(h)(8). Pet. App. 7. Indeed, while *Brown* emphasizes that there was not "any dispute presented to the court by the so-called motion" at issue there, 285 F.3d at 961, the government's filing here triggered a vigorous dispute between the parties about the appropriateness of granting an ends-of-justice continuance, see Pet. App. 9.

c. Petitioner further argues (Pet. 13-17) that even if the government's filing were a "motion" for purposes of Section 3161(h)(1)(F), it did not toll the STA clock because it did not cause any delay. Petitioner did not press that claim below. As the court of appeals explained, "[t]he parties' disagreement [was] * * * confined to the question whether the government's filing of November 18, 2003 was a 'motion' within the meaning of 18 U.S.C. § 3161(h)(1)(F)," and petitioner did "not argue that, if the government's November 18, 2003 filing qualifies as a motion, the court exceeded the permissible period of excludable time for disposing of the motion." Pet. App. 14 & n.10. Review of petitioner's newly minted causation argument should be denied for that reason alone. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam).

In any event, petitioner's contention lacks merit. Like any pretrial motion, the government's motion resulted in delay because the court could not have begun trial before it acted on the motion. No further inquiry is needed, because Section 3161(h)(1)(F)'s exclusion is "automatic." *United States* v. *Henderson*, 476 U.S. 321, 327 (1986) (citation omitted); S. Rep. No. 212, 96th Cong., 1st Sess. 31, 33 (1979). The Act does not require a further, potentially complicated analysis of whether the same delay might have resulted from other causes. See, *e.g.*, *United States* v. *Vo*, 413 F.3d 1010, 1015 (9th Cir.), cert. denied, 126 S. Ct. 785 (2005); *United States* v. *Vogl*, 374 F.3d 976, 985 (10th Cir. 2004).

There is no conflict among the courts of appeals on that point. In *United States* v. *Mentz*, 840 F.2d 315 (1988), the Sixth Circuit held that a defendant's discovery request that was directed toward the government and did not require a district court ruling did not qualify

as a motion. In *United States* v. *Gonzales*, 137 F.3d 1431 (1998), the Tenth Circuit held that a defendant's motion to dismiss the indictment on STA grounds was not a motion because it merely memorialized for the record the defendant's objection to an ends-of-justice continuance that the court had already granted. Here, in contrast to the unusual facts of *Mentz* and *Gonzalez*, the government's motion presented a live controversy for the court to decide. The Tenth Circuit has confirmed that its decision in *Gonzalez* does not require a showing of actual delay in such circumstances, and has noted that "[t]he circuit courts are unanimous" on that point. *Vogl*, 374 F.3d at 985 & n.10.

In *United States* v. *Gambino*, 59 F.3d 353 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996), and *United States* v. *Clymer*, 25 F.3d 824 (9th Cir. 1994), the Second and Ninth Circuits held that after a district court postpones a hearing on a motion until during or after trial, the ensuing time is not excluded under Section 3161(h)(1)(F). The Ninth Circuit explained that in such circumstances, the postponement is effectively a denial without prejudice, and it would make little sense to conclude that *all* pre-trial time is thereafter excluded from the Act. *Clymer*, 25 F.3d at 830. The Ninth Circuit has repeatedly limited *Clymer* to that fact pattern, however, and has held that "the time a motion is pending is excludable even when the pendency of the motion causes no actual delay in the trial." *Vo*, 413 F.3d at 1015; see *id.* at 1015 n.2 (noting that "[o]ur sister circuits have reached the same conclusion" and citing cases). There is no conflict between the decision below and *Gambino* and *Clymer* because the district court here excluded only the 13 days between the filing of the motion on No-

vember 18, 2003, and its implicit denial *before* trial on December 1, 2003. See Pet. App. 14.

Nor is there any inconsistency with *Henderson*. See Pet. 16-17. *Henderson* describes the exclusion as being automatic, 476 U.S. at 327, 332, and "hold[s] that Congress intended [18 U.S.C. 3161(h)(1)(F)] to exclude from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Id.* at 330. Beyond that, *Henderson* expressly reserves the question whether a government motion to set the case for trial is excludable under Section 3161(h)(1)(F). 476 U.S. at 332; cf. *id.* at 322 (identifying the "narrow questions" before the Court). By emphasizing that the exclusion applies automatically, *Henderson* supports the court of appeals' decision in this case.

2. Petitioner also contends (Pet. 19-26) that her conviction is invalid under *Bronston* v. *United States*, 409 U.S. 352 (1973), because her disputed statements were literally true. The court of appeals' decision on that fact-bound issue is correct and does not warrant further review.

a. In *Bronston*, this Court held that an individual could not be convicted of perjury under 18 U.S.C. 1621 for giving an answer that was "literally true but not responsive to the question asked and arguably misleading by negative implication." 409 U.S. at 353; see *id.* at 361. In that case, the defendant was asked under oath whether he ever had any accounts in Swiss banks. *Id.* at 354. The defendant answered that his company previously had an account in a Swiss bank, but he failed to disclose that he personally had such an account as well. *Ibid.* The defendant's answer was literally true, because

the company had in fact had such an account. *Ibid.* The Court reversed the conviction. *Id.* at 362.

The courts of appeals have also held that a defendant may not be convicted of perjury if the prosecutor's question was "fundamentally ambiguous" in that it was "so ambiguous that it is not amenable to jury interpretation." *United States* v. *Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987); accord *United States* v. *Manapat*, 928 F.2d 1097, 1099-1100 (11th Cir. 1991); *United States* v. *Lighte*, 782 F.2d 367, 375 (2d Cir. 1986). In contrast, the courts have held that if a question contains only some degree of ambiguity, a defendant may be prosecuted if the finder of fact could conclude that the defendant understood the question as the government did, and, with that understanding, answered falsely. See, *e.g.*, *United States* v. *Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004), cert. denied, 126 S. Ct. 38 (2005); *United States* v. *Reilly*, 33 F.3d 1396, 1415-1416 (3d Cir. 1994); *United States* v. *Swindall*, 971 F.2d 1531, 1553 (11th Cir. 1992), cert. denied, 510 U.S. 1040 (1994). Whether a question was fundamentally ambiguous is a question of law, but whether an answer to an arguably ambiguous question was false is a question of fact for the jury. *United States* v. *Damrah*, 412 F.3d 618, 627 (6th Cir. 2005); *Camper*, 384 F.3d at 1076.

b. Petitioner does not dispute those well-settled legal principles. Instead, she contends (Pet. 19-22) that the court of appeals' decision conflicts with decisions of every other court of appeals by holding that the literal truth defense does not apply when the government's theory is that the defendant's false statements conflicted with the facts the government alleges to be true. That contention is based on a misperception of the court of appeals' decision.

The First Circuit, like the other circuits cited by petitioner, has held without limitation that "[a]t a bare minimum, the remark must have been literally false" to give rise to a perjury prosecution. *United States* v. *Reveron Martinez*, 836 F.2d 684, 689 (1988). On the facts of this case, however, whether petitioner's answers were literally true turns on the meaning of the questions. Thus, the court of appeals recognized that the ambiguity cases provide the correct framework for analyzing petitioner's contention, and it considered at length the question whether the answers were true, literally or otherwise, in light of the questions to which they responded. See Pet. App. 26-32. Although petitioner seizes (Pet. 19-20) on the court's reliance on the government's "theory of perjury," Pet. App. 26, the point is simply that, on the facts of this case, the issue is whether the questions were sufficiently ambiguous that petitioner's answers could be considered, as a matter of law, to be true.

The court of appeals correctly determined that the record does not support petitioner's contention that the questions, when placed in context, were so fundamentally ambiguous that she is entitled to judgment as a matter of law. Pet. App. 27-33. With respect to Answers 3 and 4—the only specific false statements challenged by petitioner in this Court (see Pet. 23)—the court of appeals explained that the prosecutor's use of the term "on a contract" instead of "outside a contract" was not fundamentally ambiguous because the prosecutor's question continued a line of questioning in which he sought to determine whether TAP provided financial support to Lahey Clinic that was not listed in the written contract but was part of the parties' hidden agreement. Pet. App. 32. In context, the questions were not

so ambiguous as to entitle petitioner to judgment as a matter of law.

Instead, it was for the jury to decide whether the statements were false, and the district court and the court of appeals correctly held that the evidence was sufficient to support the jury's verdict that at least one of petitioner's statements was false. See Pet. App. 33-34. In any event, petitioner forfeited any challenge to the sufficiency of the evidence by not raising it in the court of appeals, *id.* at 33, and by challenging in this Court only "the legal sufficiency of the colloquy to support the charge," Pet. 26 n.3, not the sufficiency of the evidence to prove falsity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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