No. 06-975

In the Supreme Court of the United States

JAMES A. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

STEPHAN E. OESTREICHER, JR.
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in upholding petitioner's convictions for false declarations and obstruction of justice, the court of appeals correctly concluded that petitioner's testimony before a grand jury was not literally true and that there was sufficient evidence that petitioner's testimony was untruthful.

2. Whether the court of appeals correctly concluded that the questions petitioner was asked before the grand jury were not fundamentally ambiguous.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

Statutes and rules—Continued: Page

In the Supreme Court of the United States

No. 06-975

JAMES A. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-47a) is reported at 459 F.3d 509.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2006. A petition for rehearing was denied on October 18, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As is relevant here, following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of false declarations before a grand jury, in violation of 18 U.S.C. 1623, and obstruction of justice, in violation of 18 U.S.C. 1503. He

was sentenced to 46 months of imprisonment, to be followed by one year of supervised release. The court of appeals affirmed in relevant part. Pet. App. 2a-47a.

1. a. This case involves one of the most notorious episodes in the scandal leading to the collapse of Enron Corporation. In 1999, Enron executives were under considerable pressure to book earnings at the end of the year in order to meet the company's earnings targets. As part of that effort, the executives attempted to sell the primary asset of one of Enron's energy divisions: three power-generating barges that were moored off the coast of Nigeria. With the end of the year approaching and no willing buyer coming forward, the executives discussed the need for an "emergency alternative." They decided to approach the investment bank Merrill Lynch to see if it would be willing to "help Enron out" by purchasing an interest in the barges. Pet. App. 2a-4a.

In late December 1999, Enron treasurer Jeff McMahon approached Robert Furst, Enron's liaison at Merrill Lynch, and asked if Merrill would be willing to purchase an interest in the barges as a "bridge" until a permanent buyer could be found, in return for a flat fee. McMahon gave Furst an "oral guarantee" that Merrill would be "taken out" of the transaction in six months. The practical effect of that guarantee was to render the transaction a sham, because Merrill would thereby be protected against any equity risk in the barges. If the oral guarantee had become widely known, it would have defeated the purpose of the deal, because the applicable accounting rules would have prohibited Enron from treating the transaction as a sale (and thus would have prevented Enron from booking earnings from the transaction). Pet. App. 4a-5a & n.1; Gov't C.A. Br. 36-37.

Furst discussed the proposal with various others at Merrill, including petitioner, who was head of the Strategic Asset and Lease Finance group, and Daniel Bayly, who was head of the Global Investment Banking division. Although Furst was enthusiastic about the transaction, emphasizing the importance of developing Merrill's relationship with Enron, petitioner initially expressed concerns about the transaction, noting in a fax the lack of a "repurchase oblig[ation] from Enron" and the "reputational risk" of "aid[ing]/abet[ting] Enron income st[atement] manipulation." Pet. App. 3a-4a; Gov't C.A. Br. 15-18.

On December 22, 1999, Furst; petitioner; Bayly; Schuyler Tilney, a Merrill banker; and other Merrill executives participated in a conference call about the proposal. Furst and Tilney explained that Enron wanted Merrill to invest in the barges by year's end so that Enron could meet its earning targets. Furst and Tilney then stated that "[s]omebody" at Enron had "told Merrill Lynch that they would help us find a third party to buy the barges from us and, if that didn't happen by June 30th of 2000, Enron Corporation would buy the barges back from us." When Bayly asked whether Merrill could receive a "written guaranty to support that representation," one of the others responded that Enron could not put the guarantee in writing because it would preclude Enron from booking earnings from the transaction. Pet. App. 5a; Tr. 1044-1046.

The following morning, petitioner faxed an "Appropriation Request" to Merrill's accounting department. That document described the proposed transaction in detail, explaining that "Enron * * * have assured us that we will be taken out of our investment within six months" and that Bayly was planning to participate in a

conference call in which Enron would "confirm[] this commitment to guaranty the [Merrill] takeout." The conference call took place the same morning; on that call, Enron Chief Financial Officer (CFO) Andrew Fastow confirmed the guarantee to buy out Merrill. Although petitioner did not participate in the call, he subsequently sent an e-mail to a colleague in which he cited the barge transaction as "precedent" for obtaining an off-the-books guarantee in a transaction with another company. Specifically, petitioner explained that, in the barge transaction, Merrill "had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what." Pet. App. 6a; Gov't C.A. Br. 10, 18-19, 29-34, 38-51, 67-86; Gov't Exh. 212, at 2.

The barge transaction was closed on December 29, 1999; Enron reported just over $12 million in resulting earnings. When Enron could not find a buyer for Merrill's interest in the barges within six months, Enron subsequently arranged for the interest to be purchased by LJM2, a partnership which was controlled by Fastow (and in which petitioner and other Merrill executives had invested). Pursuant to the terms of the transaction, Merrill made $775,000 on its investment. Pet. App. 7a-8a & n.2; Gov't C.A. Pet. for Reh'g 4-5; Gov't Exh. 216.

b. The charges at issue in this case arise from statements made by petitioner before a grand jury in the Southern District of Texas that was investigating the barge transaction. In those statements, petitioner denied knowledge of any promise from Enron that Merrill would be "taken out" of the transaction within six months. In pertinent part, and as quoted in the indictment (with the italicized phrases representing the charged false statements), petitioner testified as follows:

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A: *It's inconsistent with my understanding of what the transaction was.*

. . .

Q: . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: *In—no, I don't—the short answer is no, I'm not aware of the promise.* I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, *and I did not think it was a promise though.*

Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?

A: *No.*

Pet. App. 28a-29a (brackets in original).

2. As is relevant here, a grand jury in the Southern District of Texas indicted petitioner on one count each of false declarations before a grand jury, in violation of 18 U.S.C. 1623, and obstruction of justice, in violation of 18 U.S.C. 1503. With regard to those counts, the indictment alleged that the italicized statements were false and that petitioner knew that they were false when he made them. Pet. App. 26a. Petitioner did not file a motion to dismiss either count. A jury found petitioner guilty on both counts. *Id.* at 60a-63a. The district court

subsequently denied petitioner's motion for judgment of acquittal or, in the alternative, a new trial. *Id.* at 55a-59a.[1]

3. A divided court of appeals affirmed in relevant part. Pet. App. 2a-47a.

a. As a preliminary matter, the court of appeals noted that petitioner argued, *inter alia*, that (1) "he testified truthfully as to his subjective understanding of the barge deal" and (2) "the questions posed to him before the grand jury were too 'vague and ambiguous' to support a perjury conviction." Pet. App. 29a. The court reasoned that "[e]ach of these arguments is properly characterized as an attack on the sufficiency of the evidence." *Ibid.* The court rejected petitioner's contention that his claims challenged the "legal sufficiency" of the charges against him (and that his claims were thus subject to de novo review). *Id.* at 29a n.16.

On the merits, the court of appeals first held that there was sufficient evidence for a reasonable jury to find that petitioner's testimony before the grand jury was untruthful. Pet. App. 30a-32a. Along with other evidence, the court cited the fact that, during the December 22, 1999, conference call in which petitioner participated, "it was noted * * * that, if a third party buyer was not secured by June 30, 2000, Enron would repurchase the barges from Merrill." *Id.* at 30a. The court further cited the fact that petitioner stated, in his

---

[1] The grand jury also indicted petitioner and five others on one count of conspiracy, in violation of 18 U.S.C. 371, and two counts of wire fraud, in violation of 18 U.S.C. 1343. All but one of the defendants were convicted on all three counts. Pet. App. 60a-63a. Some of the defendants appealed, and the court of appeals vacated the appellants' convictions on the conspiracy and wire-fraud counts. *Id.* at 2a-47a. Those convictions are not at issue here.

subsequent e-mail to a colleague, that "we had Fastow get on the phone with Bayly and lawyers and promise to pay us back *no matter what*." *Id.* at 31a.

In addition, the court of appeals rejected petitioner's "further argu[ment] that his testimony was not actually false" because petitioner denied knowledge only of a "promise" that Merrill would be bought out (and not of some less definitive "comfort" concerning the possibility of a buyout). Pet. App. 31a. The court reasoned that "[t]his distinction and the spin placed on selective and hypertechnical word choice provides no refuge from the jury's verdict." *Ibid.*

The court of appeals then held that the questions petitioner was asked before the grand jury were not fundamentally ambiguous. Pet. App. 32a. "Our review of [petitioner's] testimony," the court explained, "convinces us that the questions posed adequately conform with the principle that '[p]recise questioning is imperative as a predicate for the offense of perjury.'" *Ibid.* (second alteration in original) (quoting *Bronston* v. *United States*, 409 U.S. 352, 362 (1973)). The court noted that "[t]here is no indication that [petitioner] struggled to understand or actually misunderstood the meaning of the questions"; "[petitioner's] answers were carefully responsive to the questions posed"; and "[petitioner's] caution in his word choice * * * indicates he was keenly aware of the thrust of the prosecutor's questions." *Ibid.*

b. Judge DeMoss dissented in relevant part. Pet. App. 43a-47a. Judge DeMoss did not contend that petitioner's claims were subject to de novo review, but instead asserted only that "no reasonable jury could conclude that [petitioner's] testimony before the Grand Jury was false." *Id.* at 47a. He described the December

22 conference call as a "business negotiation[] preceding a deal ultimately reduced to a written agreement." *Id.* at 43a. And he characterized petitioner's subsequent e-mail as "an overly simplified, shorthand description of the barge investment made after the fact in an effort to secure a subsequent, entirely unrelated deal." *Id.* at 46a.

4. The court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. Pet. App. 1a.

ARGUMENT

Petitioner contends that the court of appeals erred by "refusing to give *de novo* or plenary consideration" to his claims that (1) his testimony before the grand jury was literally true and (2) the questions he was asked before the grand jury were fundamentally ambiguous. Pet. i. Those claims lack merit, and further review is unwarranted.

1. Petitioner first contends (Pet. 15-19) that the court of appeals erred by treating his claim that his testimony before the grand jury was literally true as a challenge to the sufficiency of the evidence, rather than as a legal claim subject to de novo review. That contention is invalid.

a. In *Bronston* v. *United States*, 409 U.S. 352 (1973), this Court held that an individual could not be convicted of perjury under the generic perjury statute, 18 U.S.C. 1621, for giving an answer that was literally true, even if it was not responsive and arguably misleading. In that case, the defendant was asked under oath whether he had ever had any accounts in Swiss banks. 409 U.S. at 354. He answered that his company had previously had an account in a Swiss bank, but he failed to disclose

that he had 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 defendant's conviction. *Id.* at 362. Although *Bronston* itself involved a prosecution under the generic perjury statute, lower courts have held that *Bronston* is equally applicable to prosecutions for false declarations before a grand jury under 18 U.S.C. 1623. See, *e.g.*, *United States* v. *Richardson*, 421 F.3d 17, 32 n.16 (1st Cir. 2005), cert. denied, 126 S. Ct. 2319 (2006); *United States* v. *Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998), cert. denied, 525 U.S. 1177 (1999); *United States* v. *Abrams*, 568 F.2d 411, 422 (5th Cir.), cert. denied, 437 U.S. 903 (1978).

At most, *Bronston* stands for the proposition that, where a defendant prosecuted for perjury made a statement that is not disputed to be literally true, that statement cannot be perjurious simply because it was arguably misleading. Where there is no *factual* dispute concerning the literal truth of the statement, therefore, the defendant is entitled to dismissal (or acquittal) as a matter of law. See, *e.g.*, *United States* v. *Good*, 326 F.3d 589, 591 (4th Cir. 2003); *United States* v. *DeZarn*, 157 F.3d 1042, 1046 (6th Cir. 1998); *Shotts*, 145 F.3d at 1297; *Abrams*, 568 F.2d at 421. Where the government presents evidence that the defendant's statement was not literally true, however, *Bronston* does not provide that the defendant is entitled to have the court decide the truth of his statement itself. Instead, the question of the falsity of the statement is submitted to the jury (as an element of the offense of perjury), subject to review only for sufficiency of the evidence. See *United States* v. *Camper*, 384 F.3d 1073, 1075 (9th Cir. 2004), cert. denied, 546 U.S. 827 (2005); *United States* v. *Lighte*, 782

F.2d 367, 373 (2d Cir. 1986). Although petitioner contends (Pet. 15-19) that there is a circuit conflict on the *scope* of the *Bronston* rule—*viz.*, whether *Bronston* applies only to a statement that is not responsive to the corresponding question—petitioner cites no authority for the proposition that, in the wake of *Bronston*, *all* claims concerning the truth of statements are legal claims subject to de novo review.

b. The court of appeals in this case determined that petitioner contended that there was insufficient evidence that his statements before the grand jury were false, rather than that his statements were literally true as a matter of law. See Pet. App. 29a n.16 (concluding that "[i]t is clear * * * that [petitioner's] challenge is to the sufficiency of the evidence" and that petitioner had "mischaracterize[d] his challenges" as a legal claim).[2] That fact-bound characterization of petitioner's claim was correct and does not independently warrant this Court's review.

As an initial matter, although the indictment in this case identified the statements that were alleged to be untrue, see Pet. App. 28a-29a (quoting indictment), petitioner did not move to dismiss the perjury and obstruction counts against him—let alone move to dismiss them on the ground that the identified statements were literally true. Although courts have recognized that a defendant is not *required* to raise a literal-truth claim in a motion to dismiss, see, *e.g.*, *Lighte*, 782 F.2d at 373, defendants typically do so (and, indeed, have every incen-

[2] Although Judge DeMoss dissented on the ground that the evidence was insufficient to support the conclusion that petitioner's statements were false, he seemingly agreed with the majority that petitioner's claim was properly characterized as a sufficiency-of-the-evidence challenge. See, *e.g.*, Pet. App. 43a.

tive to do so, in order to avoid trial). See, *e.g.*, *Good*, 326 F.3d at 590-591; *DeZarn*, 157 F.3d at 1046-1047; but cf. *United States* v. *Yasak*, 884 F.2d 996, 1001 n.3 (7th Cir. 1989) (suggesting that, at least in some cases, the literal truth of a statement cannot be determined on a motion to dismiss because "it involve[s] a jury question on the ultimate issue of guilt or innocence"). Petitioner's failure to move to dismiss the perjury and obstruction counts strongly suggests that the claim later raised by petitioner in his motion for acquittal constituted a challenge to the sufficiency of the evidence that his statements before the grand jury were false, rather than a claim that the statements were literally true as a matter of law.

In his subsequent motion for acquittal, moreover, petitioner explicitly made a sufficiency-of-the-evidence challenge. See Dkt. No. 645, at 17 (contending that "the evidence failed to show beyond a reasonable doubt that [petitioner] made a false declaration before the grand jury or that he obstructed justice") (capitalization altered). And petitioner's appellate briefs confirm the court of appeals' characterization of his claim. Although petitioner did refer on several occasions to the "literal truth" of his statements, *e.g.*, Pet. C.A. Br. 61, 66; Pet. C.A. Reply Br. 42 n.42, the thrust of petitioner's claim was simply that the statements were "[t]ruthful." See, *e.g.*, Pet. C.A. Br. 62 (argument header). Notably, petitioner made numerous assertions in his briefs about the weight and credibility of various pieces of evidence. See, *e.g.*, *ibid.* (suggesting that "[t]he government's only evidence of perjury and obstruction was an off-the-cuff, casual email [petitioner] wrote * * * in an unrelated transaction"); *id.* at 63-64 (contending that "[Enron CFO] Fastow himself had contradicted [petitioner's]

email" and that "[n]o reasonable jury could have convicted [petitioner] if the jury had heard that *Fastow himself did not say he promised to pay Merrill back no matter what*"). Such assertions are characteristic of a sufficiency-of-the-evidence challenge. See, *e.g.*, *United States* v. *Parr*, 516 F.2d 458, 464 (5th Cir. 1975) (explaining that, where the "[i]ssues are of credibility, the weight of evidence, and conflicts in evidence," "[t]he standard of proof is the same in a [Section] 1623 perjury case as in any other criminal case": *i.e.*, "whether a reasonable jury could * * * conclude beyond a reasonable doubt" that the defendant was guilty).

c. Having thus characterized petitioner's claim, the court of appeals correctly concluded that there was sufficient evidence that petitioner's testimony was untruthful, and that fact-bound conclusion does not warrant further review.

In the statements at issue, petitioner repeatedly told the grand jury that he had no knowledge that Enron had "promise[d]" that Merrill's interest in the barges would be bought out by June 30, 2000 (and that his "understanding" of the transaction was to the contrary). See Pet. App. 28a-29a. Petitioner, however, participated in the conference call in which his colleagues Furst and Tilney indicated that Enron had orally guaranteed to repurchase Merrill's interest in the barges, *id.* at 5a; Tr. 1044-1046, and the fax petitioner sent on the morning of the conference call with Enron explained that the purpose of the call was for Enron to "confirm[] [its] commitment to guaranty the [Merrill] takeout." Gov't Exh. 212, at 2. And in the subsequent e-mail he sent to a colleague, petitioner confirmed his understanding that, in the barge transaction, Enron CFO Fastow had "promise[d] to pay us back no matter what." Pet. App.

6a.[3] That evidence was more than sufficient to support the jury's determination that petitioner's statements that he had no knowledge that Enron had "promise[d]" to buy out Merrill were untruthful.[4]

d. In any event, this case would constitute a poor vehicle for exploring the boundary between a legal claim that a defendant's statements were literally true and a challenge to the sufficiency of the evidence that the defendant's statements were false. That is because, while the court of appeals initially determined that petitioner was pursuing a sufficiency-of-the-evidence claim, see Pet. App. 29a & n.16, it not only addressed that claim, see *id.* at 30a-31a, but discretely addressed petitioner's "further" claim that, even assuming that there was sufficient evidence that petitioner knew that Enron had provided some less definitive "comfort" concerning the pos-

---

[3] Before the court of appeals, petitioner contended that the e-mail constituted inadmissible hearsay. See Pet. C.A. Br. 18 n.11, 33-34 n.20. The court of appeals, however, held that the e-mail was admissible both under Federal Rule of Evidence 801(c), as evidence of petitioner's state of mind, and under Federal Rule of Evidence 801(d)(2)(A), as an admission by a party opponent. Pet. App. 31a n.17. Petitioner does not renew his challenge to the admissibility of the e-mail before this Court.

[4] Petitioner renews his contention (Pet. 6 n.6) that Fastow stated in an interview with the Federal Bureau of Investigation (FBI) that he never guaranteed that Enron would repurchase Merrill's interest in the transaction. See Pet. C.A. Br. 62-64; Pet. C.A. Reply Br. 50-53 & n.54. The document on which petitioner relies, however, was not admitted into evidence at trial. In any event, that document does not support petitioner's contention. That document indicates only that Fastow did not use the actual word "guarantee" in the conference call with Merrill, out of concern that doing so would have "blown the accounting treatment of the deal." Instead, Fastow "us[ed] euphemisms to convey a promise to take Merrill out of the barges," on the theory that "the participants in the call knew what Fastow meant." Dkt. No. 241, Exh. B, at 4-5.

sibility of a buyout, petitioner's statements were literally true because petitioner denied knowledge only of a "promise" that Merrill would be bought out. See *id.* at 31a. The court of appeals seemingly considered that literal-truth claim de novo, but ultimately rejected it on the ground that any distinction between a "promise" and some less definitive "comfort" was "hypertechnical" and could not justify overturning the jury's verdict. See *ibid.* Petitioner cites that portion of the court of appeals' opinion in his petition only in passing, see Pet. 28, and does not contend that the court of appeals' reasoning, in rejecting his literal-truth claim on the merits, conflicts with any decision of another court of appeals considering a similar claim. Overall, therefore, petitioner identifies no aspect of the court of appeals' treatment of his claim concerning the truthfulness of his statements that warrants further review.

2. In a similar vein, petitioner contends (Pet. 19-23) that the court of appeals erred by treating his claim that the questions he was asked before the grand jury were ambiguous as a challenge to the sufficiency of the evidence, rather than as a legal claim subject to de novo review. That contention is also invalid.

a. As petitioner notes (Pet. 20-22), the courts of appeals have generally taken a twofold approach when reviewing claims by defendants in perjury prosecutions that the questions they were asked were ambiguous. Courts have held that a prosecution for perjury is foreclosed as a matter of law where the question at issue was "fundamentally ambiguous": that is, where the question was "so ambiguous that it is not amenable to jury interpretation." *United States* v. *Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987); see, *e.g.*, *United States* v. *Markiewicz*, 978 F.2d 786, 808-809 (2d Cir. 1992), cert. denied, 506

U.S. 1086 (1993); *United States* v. *Damrah*, 412 F.3d 618, 627 (6th Cir. 2005); *United States* v. *Martellano*, 675 F.2d 940, 942 (7th Cir. 1982); *United States* v. *Hirsch*, 360 F.3d 860, 863 (8th Cir. 2004); *United States* v. *Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003), cert. denied, 540 U.S. 1111 (2004); *United States* v. *Farmer*, 137 F.3d 1265, 1268 (10th Cir. 1998); *United States* v. *Manapat*, 928 F.2d 1097, 1099-1100 (11th Cir. 1991). Those same courts have also held that, where the question at issue contains only some degree of ambiguity, a defendant may be prosecuted for (and convicted of) perjury where a reasonable jury could conclude that the defendant understood the question in the same way that the government did and, having that understanding, answered falsely. See, *e.g.*, *United States* v. *Bonacorsa*, 528 F.2d 1218, 1221 (2d Cir.), cert. denied, 426 U.S. 935 (1976); *United States* v. *Slawik*, 548 F.2d 75, 86 (3d Cir. 1977); *Damrah*, 412 F.3d at 627-628; *United States* v. *Williams*, 536 F.2d 1202, 1205 (7th Cir. 1976); *United States* v. *Williams*, 552 F.2d 226, 229 (8th Cir. 1977); *Culliton*, 328 F.3d at 1078-1079; *Farmer*, 137 F.3d at 1269; *Manapat*, 928 F.2d at 1100.

Contrary to petitioner's suggestion (Pet. 23 n.17), the Fifth Circuit's prior decisions are consistent with that twofold approach. In *United States* v. *Whitaker*, 619 F.2d 1142 (1980), the Fifth Circuit considered a defendant's claim, in a prosecution under 18 U.S.C. 1623, that "the questions he was asked before the grand jury were so imprecise that they are insufficient as a matter of law to support an indictment for perjury." 619 F.2d at 1148. After seemingly engaging in de novo review, the court concluded that "[t]he questions propounded are not so imprecise as to be insufficient to support a perjury conviction as a matter of law." *Id.* at 1148-1149. By con-

trast, in *United States* v. *Bell*, 623 F.2d 1132 (1980), the Fifth Circuit, citing decisions from other circuits reaching the same conclusion, held that, where a question is "arguably ambiguous," "the defendant's understanding of the question is a matter for the jury to decide." *Id.* at 1136 (citing, *inter alia*, *Williams*, 552 F.2d at 229, and *Slawik*, 548 F.2d at 86).[5]

b. Although the court of appeals in this case initially characterized petitioner's challenges to his perjury and obstruction convictions as challenges to the sufficiency of the evidence, see Pet. App. 29a, the court discretely addressed petitioner's claim that the questions he was asked before the grand jury were fundamentally ambiguous—and, in doing so, seemingly considered that claim de novo. See *id.* at 32a. The court concluded that "[o]ur review of [petitioner's] testimony convinces us that the questions posed adequately conform with the principle that '[p]recise questioning is imperative as a predicate for the offense of perjury.'" *Ibid.* (quoting *Bronston*, 409 U.S. at 362). The court noted that "[t]here is no indication that [petitioner] struggled to understand or actually misunderstood the meaning of the questions"; "[petitioner's] answers were carefully responsive to the questions posed"; and "[petitioner's] caution in his word choice * * * indicates he was

---

[5] Petitioner suggests (Pet. 23 & n.17) that, in *United States* v. *Parasiris*, 85 Fed. Appx. 380 (2004) (per curiam), the Fifth Circuit held that "*all* claims of ambiguity in connection with a perjury charge—including claims of 'fundamental ambiguity'—raise questions of fact for the jury subject to appellate review for sufficiency of the evidence." To the extent that some language in that opinion could be read to suggest that a claim of "fundamental ambiguity" is not subject to de novo review, that language has no precedential effect because the opinion in *Parasiris* was unpublished. See 5th Cir. R. 47.5.4.

keenly aware of the thrust of the prosecutor's questions." *Ibid.* The court of appeals' reference to "[o]ur review of [petitioner's] testimony," together with the absence of any reference to the reasonable-jury standard applicable in sufficiency-of-the-evidence challenges, strongly suggests that the court was engaging in de novo, rather than deferential, consideration of petitioner's claim. Contrary to petitioner's contention (Pet. 20), therefore, the court of appeals did not "reject[] the notion that a claim of fundamental ambiguity raises a threshold legal issue for *de novo* review," and the court of appeals' decision thus does not conflict with the decision of any other court of appeals.

c. The court of appeals correctly concluded that the questions petitioner was asked before the grand jury were not fundamentally ambiguous, and that fact-bound conclusion does not warrant further review.

Before the grand jury, the prosecution asked petitioner whether he "ha[d] any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th"; whether he "ha[d] any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000"; and whether he "ha[d] any understanding as to why there would be a reference [in the Merrill Lynch document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000." Pet. App. 28a-29a (brackets in original). Petitioner contends (Pet. 12) that these questions are fundamentally ambiguous because the prosecution "never specifically asked about an oral promise, or any promise separate from the binding terms of the integrated, written agreements." As the court of appeals noted (Pet. App. 32a), however, it is clear that petitioner understood the questions in the

same way as the government did: *i.e.*, as inquiring whether petitioner knew that Enron had made *any* promise, in any form, to buy out Merrill's interest in the barges. Specifically, in response to a question as to whether Enron had provided any "assurances" that Merrill would be "taken out" of the transaction, petitioner acknowledged that he knew that Enron had provided some less definitive "comfort" concerning the possibility of a buyout, but denied knowledge of any "guarantee" that Merrill would be bought out. *Id.* at 27a n.14. Having conceded in response to that question that he knew that Enron had provided *some* form of assurance to Merrill, petitioner cannot contend that he understood *other* questions to exclude an oral assurance (or an assurance that was not reflected in the documentation of the transaction). At a minimum, the relevant questions were not "so ambiguous that [they were] not amenable to jury interpretation," *Ryan*, 828 F.2d at 1015, and the court of appeals thus did not err by holding that they were not fundamentally ambiguous.

d. Finally, petitioner suggests (Pet. 22-23) that the Fourth Circuit applies de novo review to *all* claims concerning ambiguity in questioning, even where the questions at issue were merely arguably ambiguous. As a preliminary matter, to the extent that the court of appeals in this case applied de novo review to petitioner's claim that the questions he was asked were *fundamentally* ambiguous, its decision would not implicate any circuit conflict concerning the standard of review for claims concerning *arguably* ambiguous questioning. Petitioner does not contend that any other court of appeals has applied deferential review to a claim concerning fundamentally ambiguous questioning, and peti-

tioner thus identifies no circuit conflict implicated by the court of appeals' decision here.

In any event, it is far from clear whether petitioner's characterization of the Fourth Circuit's approach to claims concerning ambiguity in questioning is correct. In *United States* v. *Race*, 632 F.2d 1114 (1980), the Fourth Circuit did state that "one cannot be found guilty of a false statement * * * beyond a reasonable doubt when his statement is within a reasonable construction" of the terms used. *Id.* at 1120. The Ninth Circuit, like petitioner, has read *Race* as establishing a legal bar against a perjury conviction where the prosecution asks *any* ambiguous question, regardless whether it is "fundamentally" ambiguous or merely "arguably" ambiguous. See *Camper*, 384 F.3d at 1077 (stating that *Race* "held that a defendant cannot be convicted * * * for an ambiguous statement").

In *Race*, however, the Fourth Circuit did not explicitly state that de novo review would apply even to claims concerning arguably ambiguous questioning. In the statement quoted above, the Fourth Circuit may merely have recognized the obvious point that, "[b]y offering an interpretation of the question that is at least as reasonable as the government's interpretation, the defendant puts into issue the sufficiency of the evidence as to both of the essential elements [of perjury]": *i.e.*, that the defendant's statement was false and that the defendant knew that it was false. *Bell*, 623 F.3d at 1136. That interpretation is supported by the Fourth Circuit's subsequent decision in *United States* v. *Heater*, 63 F.3d 311 (1995), cert. denied, 516 U.S. 1083 (1996), in which the court determined that there was "no 'fundamental ambiguity' that would have required the district court to remove the [prosecution's] questions from the jury's con-

sideration." *Id.* at 327 (citing *Yasak*, 884 F.2d at 1003). The Fourth Circuit's reference to "fundamental ambiguity" in *Heater* suggests that the Fourth Circuit follows the same twofold approach to claims concerning ambiguity in questioning as other circuits. And to the extent that the Fourth Circuit does follow that approach, petitioner fails to identify any circuit conflict concerning the treatment of claims of ambiguity, much less a circuit conflict actually implicated by the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

STEPHAN E. OESTREICHER, JR.
Attorney

APRIL 2007