No. 07-1262

In The
Supreme Court of the United States

LETANTIA BUSSELL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

DAN MARMALEFSKY
MORRISON & FOERSTER LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 892-5200

BETH S. BRINKMANN
Counsel of Record
KETANJI BROWN JACKSON
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544

Counsel for Petitioner

June 18, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

A. The United States' Attempt To Downplay The Circuit Conflict On The False Statements Standard Misreads Fourth Circuit Law 1

B. This Case Presents An Appropriate Vehicle For Resolution Of The Conflict On The Law Of False Statements And For Reversal Of The Ninth Circuit 5

C. The Statutory Question Of Restitution Based On Conduct Of Which The Defendant Was Not Convicted Squarely Presents Another Circuit Split That Requires This Court's Review 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....12

Bronston v. United States, 409 U.S. 352 (1973) 6, 7

Hughey v. United States, 495 U.S. 411 (1990).....11

MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764 (2007).....5

United States v. Bennett, 943 F.2d 738 (7th Cir. 1991), *cert. denied*, 504 U.S. 987 (1992).....11

United States v. Bollin, 264 F.3d 391 (4th Cir.), *cert. denied*, 534 U.S. 935 (2001).....4

United States v. Booth, 309 F.3d 566 (9th Cir. 2002).....10

United States v. Bryan, 58 F.3d 933 (4th Cir. 1995).....4

United States v. Camper, 384 F.3d 1073 (9th Cir. 2004), *cert. denied*, 546 U.S. 827 (2005).....1

United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994).....10

United States v. Culliton, 328 F.3d 1074 (9th Cir. 2003), *cert. denied*, 540 U.S. 1111 (2004) 3, 5

United States v. George, 403 F.3d 470 (7th Cir.), *cert. denied*, 546 U.S. 1008 (2005).....10, 11

United States v. Gunther, No. 96-4804, 1998 WL 29259 (4th Cir., Jan. 28, 1998).....4

United States v. Heater, 63 F.3d 311 (4th Cir. 1995), *cert. denied*, 516 U.S. 1083 (1996).....3, 4

TABLE OF AUTHORITIES—Continued

Page

United States v. Kane, 944 F.2d 1406 (7th Cir. 1991) 9, 12

United States v. Polichemi, 219 F.3d 698 (7th Cir. 2000), *cert. denied*, 531 U.S. 1168 (2001) 10

United States v. Pedroni, 45 Fed. Appx. 103 (3d Cir.), *cert. denied*, 537 U.S. 1045 (2002) 10

United States v. Race, 632 F.2d 1114 (4th Cir. 1980) 1, 2, 4

United States v. Randle, 324 F.3d 550 (7th Cir. 2003) 11

STATUTES

18 U.S.C. § 3663(a)(2) 9

Victim and Witness Protection Act (VWPA), Pub. L. No. 97-291, 96 Stat. 1248 (1982) 9

REPLY BRIEF FOR PETITIONER

A. The United States' Attempt To Downplay The Circuit Conflict On The False Statements Standard Misreads Fourth Circuit Law

1. The United States suggests that the conflict regarding the legal standard for a conviction for a false statement does not warrant review because it is not a "square" conflict. Br. in Opp. 9. The Ninth Circuit itself, however, has recognized that "the Fourth Circuit takes a very different approach" than it does. *United States v. Camper*, 384 F.3d 1073, 1077 (9th Cir. 2004), *cert. denied*, 546 U.S. 827 (2005). Indeed, in this case, the Ninth Circuit upheld a conviction for false statements as valid even though the allegedly false statements are true under a reasonable construction of the government's ambiguous questions. The Fourth Circuit would invalidate that conviction as a violation of due process.

In arguing that this Circuit conflict does not merit review, the government relies on mistaken assumptions about the legal standard that the Fourth Circuit established in *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980). *Race* held that a conviction for making false statements in response to an ambiguous government contract "cannot stand" if the statements were accurate under "a reasonable construction of the contract." *Id.* at 1120.

The government attempts to narrow the import of the *Race* case by contending that "there was no

evidence in that case to support a finding that the defendants had acted in bad faith." Br. in Opp. 9 (citing *Race*, 632 F.2d at 1120-1121). The Fourth Circuit, however, placed no significance on the presence or absence of evidence of the defendants' bad faith in *Race*. To the contrary, the Fourth Circuit expressly held that "it makes no difference what the defendants thought" was meant by the government contract that elicited the allegedly false statement—the false statement conviction could not stand because the defendants' response was consistent with one reasonable interpretation of the government contract. *Race*, 632 F.2d at 1120. The government's citation (Br. in Opp. 9) to the court's reference to the absence of bad faith evidence, *Race*, 632 F.2d at 1121, misreads this case because the court's discussion was only "if it be assumed that the defendants' good faith in their construction of the contract is important," *id.* at 1120-1121, and the court held that it was not.

Race makes clear that, under Fourth Circuit law, whether an allegedly false statement is false turns solely on the legal determination that the statement is objectively false under all reasonable interpretations of the question to which the statement responds. *Ibid.* Moreover, *Race* specifies that only after that first element is established does the subjective intent of a defendant become relevant. The second element that must be established is that the subjective intent of the defendant was such that he knew the statement was false. *Ibid.* The subjective intent of the defendant thus "becomes important if, but only if, the

[statement] was false, that is, was not within [a] reasonable construction of the [question]." *Id.* at 1120.

This squarely conflicts with the Ninth Circuit rule which finds no due process flaw in a false statement conviction based on a response that is true under a reasonable construction of the question if the defendant acted in "bad faith" in construing ambiguous terms of the question. Unlike the Fourth Circuit, the Ninth Circuit would reverse such a conviction only if the question is "fundamentally ambiguous," by which the Ninth Circuit and several other Circuits (Pet. 14-15) mean something more than that the question is susceptible to more than one reasonable interpretation, *i.e.* they mean that persons "of ordinary intelligence cannot arrive at a mutual understanding of [the question's] meaning." *United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004) (quoting *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003)).

2. The Fourth Circuit cases cited by the government that were decided after *Race* (Br. in Opp. 10) have not eliminated the Circuit conflict.

In *United States v. Heater*, 63 F.3d 311, 327 (4th Cir. 1995), *cert. denied*, 516 U.S. 1083 (1996), the court did not rule that a perjury conviction is precluded only if the question is "fundamentally ambiguous." Rather, the Fourth Circuit held that the questions there were "neither vague nor misleading" and that the evidence demonstrated the defendant's answers were "deliberately false." *Ibid.* This is consistent with the

Race standard. *Heater*'s reference to the "fundamental ambiguity" language from a Seventh Circuit perjury case merely expressed the Fourth Circuit's agreement that a perjury prosecution may proceed where the question asked was *not* ambiguous. That reference did not somehow overrule, *sub silentio*, Fourth Circuit precedent on whether a false statement conviction may be sustained when the government's question *is* ambiguous. And *United States v. Bollin*, 264 F.3d 391, 411 (4th Cir.), *cert. denied*, 534 U.S. 935 (2001), merely cites to *Heater* and explains that the conviction in *Heater* was proper, using the terminology that *Heater* employed. *Ibid.* The Fourth Circuit did not purport to employ any "fundamental ambiguity" test in *Bollin*.

In *United States v. Gunther*, No. 96-4804, 1998 WL 29259 (4th Cir., Jan. 28, 1998), the Fourth Circuit rejected the defendant's assertion that the question was completely incomprehensible, noting that "[a] question is fundamentally ambiguous only when 'it is entirely unreasonable to expect that the defendant understood the question posed to him.'" *See id.* at *3 (citation omitted). There is no indication that the Fourth Circuit was overruling *Race* or adopting the Ninth Circuit's "fundamental ambiguity" test, especially given the unpublished and non-binding nature of *Gunther*.

In *United States v. Bryan*, 58 F.3d 933, 960 (4th Cir. 1995), there was no ambiguity in the government's question that might otherwise have rendered the defendant's response true under an

alternative construction. The court explained that the "prosecutor's repeated inquiry" to the witness had eliminated any other interpretations, and that the evidence permitted the jury to conclude that the defendant "deliberately lied." *Id.* at 960.

B. This Case Presents An Appropriate Vehicle For Resolution Of The Conflict On The Law Of False Statements And For Reversal Of The Ninth Circuit

1. The United States' suggestion (Br. in Opp. 11) that petitioner somehow did not preserve her challenge to her conviction for false statements is without merit. Petitioner properly argued below, under binding Ninth Circuit precedent, that the government's question was fundamentally ambiguous and that her conviction for falsely responding therefore violated due process. Pet. C.A. Br. 41-48 (No. 02-50495) (citing *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003), *cert. denied*, 540 U.S. 1111 (2004)). Petitioner's Ninth Circuit panel had no authority to overrule *Culliton*. *See MedImmune, Inc. v. Genentech, Inc.*, 127 S.Ct. 764, 770 (2007). In any event, the Ninth Circuit here did not rest merely on its view that the government's questions were not fundamentally ambiguous. The court also held that, if ambiguity existed, there was evidence of petitioner's subjective understanding of the questions and that such evidence could have permitted the jury to find petitioner had answered the questions falsely as she understood them regardless of the ambiguity (*i.e.*,

regardless of whether her answers were true under other reasonable interpretations). Pet. App. 44a-45a. Hence, the court of appeals directly addressed the issue presented for review.

The matter is not one of sufficiency of evidence as the government implies, Br. in Opp. 13 n.3, and, in any event, petitioner argued below, and repeated in the *certiorari* petition, that the prosecution had not provided any evidence of her understanding of the ambiguous terms that were the basis for her conviction. *See* Pet. 23 n.3; Pet. C.A. Br. 48-54 (No. 02-50495). Thus, petitioner did not waive any arguments related to the government's alternative characterization of the question presented.

2. The Ninth Circuit's rule violates due process and is contrary to this Court's holding in *Bronston v. United States*, 409 U.S. 352 (1973).

The government attempts to distinguish *Bronston* by citing lower court authorities that treat misleading and unresponsive, but literally true, answers more favorably than answers that are objectively true under a reasonable interpretation of a question. Br. in Opp. 12-13. But *Bronston* clearly rests on the fundamental principle that the subjective intent of a defendant in providing an answer does not control the issue of whether his perjury or false statement conviction satisfies due process. *See Bronston*, 409 U.S. at 359 ("[a] jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face,

was intended to mislead or divert the examiner"). Under *Bronston,* due process prevents a conviction even if the defendant knows what is being called for and responds with an intent to mislead. *Ibid.* Thus, due process prevented petitioner's conviction even if she subjectively understood that the bankruptcy form's request for a list of "interests" included legal and beneficial "interests," because it is reasonable to interpret "interests" to mean legal interests alone and her answer under that interpretation was not false. As in *Bronston*, a truthful response to this latter interpretation may mislead, but due process requires the government to bear the burden of clarity, and a false statement conviction cannot rest on a subjective intent to evade alone. *Id.* at 360.

C. The Statutory Question Of Restitution Based On Conduct Of Which The Defendant Was Not Convicted Squarely Presents Another Circuit Split That Requires This Court's Review

1. The government is wrong that the restitution order in this case did not rely on findings about conduct of which petitioner had been acquitted and not indicted. Br. in Opp. at 15, 21.

The government claims that the restitution order rested solely on a finding that petitioner obtained a discharge in bankruptcy that she was not entitled to receive because her total assets were, in fact, greater than her liabilities. Br. in Opp. at 16. But the

restitution order was not based on the value of "all" of petitioner's assets, *ibid.*; rather, it was based on the amount of *debt* that was discharged as a result of the bankruptcy. Pet. App. 54a-55a. The court of appeals made clear that the discharge was attributable to the district court's adoption of the values and analysis in the presentence report, which had concluded that petitioner's "concealed assets"—*including* the Utah condo of which petitioner was acquitted and certain assets that had not been charged in the indictment—were valued at between $2.84 and $3.35 million, and that when the value of those undisclosed assets was "[c]ombined" with the assets petitioner reported, that assets total exceeded petitioner's total debt. Pet. App. 19a.

The district court did *not* find, and the record does not demonstrate, that petitioner's assets would have exceeded her debts if the acquitted and unindicted assets that were included in the PSR's "concealed assets" amount had not factored into the total. In fact, the acquitted and uncharged assets had a direct impact on the restitution amount in this case because the district court accepted the government's argument that "the scope of the conspiracy with which [petitioner] was charged and convicted * * * goes beyond the two bank accounts she was convicted of concealing." Pet. App. 83a, 88a. And it was only by virtue of the court's inclusion of the Utah condo and the unindicted assets that it concluded that bankruptcy was not otherwise appropriate and that

the actual loss equaled the entire amount of the discharge. Pet. App. 20a.[1]

Moreover, the Ninth Circuit specifically addressed the issue of restitution under the VWPA (Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982)) for acquitted and uncharged conduct. Pet. App. 20a-21a. And the government did not object to the court reaching this issue precisely because the district court had "consider[ed] concealed assets beyond the two assets in which [petitioner] was indicted and convicted of concealing." *Id.* at 21a.

2. The government attempts to distinguish the ruling in this case from clearly conflicting authority of the Seventh and Third Circuits that prohibits use of acquitted conduct for restitution—*United States v. Kane*, 944 F.2d 1406, 1414-1415 (7th Cir. 1991), and

---

[1] The government is mistaken that a finding of fraudulent concealment regarding specific assets does not matter because restitution may properly rest on a valuation of "all" of a debtor's assets—even those that were "fully disclosed" or "inadvertently omitted." Br. in Opp. at 16. As the government concedes, the Victim and Witness Protection Act (VWPA) authorizes the payment of restitution only for losses caused by the defendant's *criminal conduct*. Br. in. Opp. 15 (quoting 18 U.S.C. § 3663(a)(2)). Thus, the district court's finding that the total asset amount would not have entitled petitioner to declare bankruptcy is not the end of the inquiry for *restitution* purposes; it must also be the case that the debtor's *fraudulent concealment*, as opposed to mere inadvertant omission, was the cause of the mistaken conclusion that petitioner was entitled to bankruptcy protection.

United States v. Console, 13 F.3d 641, 674 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994)—on the ground that those cases were decided before Congress amended the "victim" provision of the VWPA. Br. in Opp. 17, 18.

But *Kane* and *Console* have not been overruled, and more recent opinions from those Circuits confirm these precedents. *See United States v. George*, 403 F.3d 470 (7th Cir.), *cert. denied*, 546 U.S. 1008 (2005); *United States v. Pedroni,* 45 Fed. Appx. 103 (3d Cir.), *cert. denied*, 537 U.S. 1045 (2002). Indeed, *Kane* and *Console* are so engrained as the established law of those jurisdictions that *federal prosecutors there no longer challenge the point. See United States v. Polichemi*, 219 F.3d 698, 714 (7th Cir. 2000) ("The government concedes that restitution cannot be ordered that relates to conduct for which the defendant has been acquitted." (citing *Kane*, 944 F.2d at 1415)), *cert. denied*, 531 U.S. 1168 (2001); *Pedroni*, 45 Fed. Appx. at 111 (similar).

As for restitution relying on unindicted conduct, the government vastly overstates its argument when it asserts that the Seventh Circuit is "[i]n agreement with the Ninth Circuit." Br. in Opp. 18. In the Ninth Circuit's view, "[r]estitution is * * * not confined to harm caused by the particular offenses of which [the defendant] was convicted," and as a result, the VWPA permits restitution to be ordered for "the entire amount of loss caused to victims of the scheme." *United States v. Booth*, 309 F.3d 566, 575-576 (9th Cir. 2002). In the Seventh Circuit's much narrower

view, "[b]oth the restitution award and the persons to whom such award may be directed are *limited* by the *circumstances* of the offense for which the defendant has been convicted." *United States v. Randle*, 324 F.3d 550, 556 (7th Cir. 2003) (emphasis altered). In clear contrast to the Ninth Circuit, the Seventh Circuit holds that restitution cannot be awarded on the basis of an "amorphous" general scheme; rather, the prosecution must define the alleged scheme "with specificity," *United States v. Bennett*, 943 F.2d 738, 741 (7th Cir. 1991), *cert. denied*, 504 U.S. 987 (1992), and the court must "exclude injuries caused by offenses that are not part of the scheme," *George*, 403 F.3d at 474.

3. The Seventh and Third Circuits are correct that the VWPA does not authorize restitution for acquitted conduct. The statutory text compels that conclusion, and *Hughey v. United States,* 495 U.S. 411, 418 (1990), confirmed that the VWPA requires that restitution "be tied to the loss caused by the offense of conviction." The Circuit conflict on the meaning of the post-*Hughey* amendment to the VWPA (Pet. 35) is another reason review is warranted here.

The government's characterization of the question of restitution based on acquitted conduct as a mere challenge to inconsistencies in the jury's verdict is mistaken. Br. in Opp. 20. Although each count of an indictment might ordinarily be considered separately, *ibid.*, here, as in most conspiracy cases, the indictment links the conspiracy with the substantive underlying acts, which are alleged as separate counts

but incorporated into the conspiracy count as well. *See* Pet. App. 150a, 153a-154a. Having created the connection, the government cannot now decry the jury's conclusion that some of the acts alleged were not, in fact, part of the conspiracy of which petitioner was convicted. *See Kane*, 944 F.2d at 1414 ("[T]he jury's verdicts, taken collectively, narrow the scope of the conspiracy in which [defendant] participated.").

The Ninth Circuit's reading of the VWPA is also questionable because it enables prosecutors to define the scope of a conspiracy for restitution purposes without proving to a jury that the defendant engaged in the specific acts that caused the particular losses that are the basis for the restitution award. Because this Court has already held that the Constitution prohibits increases in punishment beyond the statutory maximum on the basis of facts that have not been determined by a jury, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the conclusion that this construction of the VWPA's restitution provision is constitutional (Br. in Opp. 21) is doubtful at best.[2]

---

[2] That the Ninth Circuit "did not address the constitutionality of the restitution order" (Br. in Opp. 22) is of no moment. The Ninth Circuit interpreted the statute, and petitioner objected to the restitution order on several grounds, including that it violated her Sixth Amendment rights.

The government notes that the Court recently denied *certiorari* in some cases raising the issue of whether a court can consider acquitted conduct when fashioning a defendant's term of imprisonment. Br. in Opp. 22. Petitioner maintains that this significant constitutional question regarding imprisonment

(Continued on following page)

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of *certiorari* should be granted or, in the alternative, the case should be held pending the Court's disposition of *Oregon v. Ice*, No. 07-901.

Respectfully submitted,

DAN MARMALEFSKY
MORRISON & FOERSTER LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 892-5200

BETH S. BRINKMANN
Counsel of Record
KETANJI BROWN JACKSON
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544

Counsel for Petitioner

JUNE 18, 2008

---

merits review (*see* Pet. 38-40), and that this case presents a particularly appropriate vehicle to resolve the imprisonment issue in conjunction with the issue of relying on acquitted and unindicted conduct for restitution.