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Perjury--Lie by Negative Implication (United States v. Bronston)

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troactive application of *Wade-Gilbert* on virtually the same critical facts as found in *Kirby*.[301] If, then, *Kirby* is not to be applied retroactively, Saltys' detention was clearly in violation of the Constitution and the law as it existed at the time of his trial.

The Second Circuit's displeasure with *Kirby* is manifestly evident in the majority's frequent approving citations to *Wade-Gilbert* and its repeated references to Justice Brennan's vigorous *Kirby* dissent.[302] While the court of appeals cannot directly refuse to follow the Supreme Court's ruling, it may have set a precedent for distinguishing *Kirby* in personal identification cases. Given the critical nature of personal identification confrontations, especially, as often is the case, when the identification is the sole evidence connecting the accused with the commission of a crime,[303] the reluctance of the Second Circuit to enthusiastically embrace *Kirby* is clearly understandable.

PERJURY — LIE BY NEGATIVE IMPLICATION

United States v. Bronston

Perjury, under federal law, is defined as the knowing and wilful giving of a materially false statement in a judicial proceeding under oath.[304] The elements of the crime are: a lawfully administered oath, a

(b) the extent of the reliance by law enforcement authorities on the old standards, and
(c) the effect on the administration of justice of a retroactive application of the new standards.

Id. at 297. However, the Court was concerned with the retroactive application of a *liberalizing* decision; retroactive application of a *narrowing* criminal law decision is usually rendered unnecessary by double jeopardy considerations. *See generally* pp. 237-40 & n.13 *supra*.

301 In both cases, the confrontation occurred before the commencement of adversary criminal proceedings. *See* Kirby v. Illinois, 406 U.S. 682, 684 (1972); Stovall v. Denno, 388 U.S. 293, 295 (1967).

302 465 F.2d at 1027-28.

303 *See, e.g.*, N.Y. Times, Nov. 11, 1972, at 1, col. 3. Lawrence Berson was arrested on charges of rape and was released on bail. Several days later, he was picked up for the rape of a fourth woman and was sent to Rikers Island House of Detention. Eyewitness testimony of the victims was the sole evidence against Berson. After 11 days in the house of detention, he was released when the police arrested one Richard Carbone who confessed to the crimes that Berson allegedly committed. Upon comparison, the two looked startlingly alike.

Oklahoma has recognized the critical nature of identification confrontations conducted prior to the initiation of adversary judicial proceedings by providing attorneys at all such instances. *See* Chandler v. State, 501 P.2d 512 (Okla. Ct. Crim. App. 1972).

304 Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly . . . wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. . . .

18 U.S.C. § 1621 (1970). This section replaced § 5392 Revised Statutes which, in turn, had replaced various perjury statutes adopted from the common law. *See, e.g.*, BLACKSTONE'S COMMENTARIES 808 (B. Gavit ed. 1941).

competent proceeding, a false and material representation made intentionally. If any of these elements is not established, a perjury conviction cannot stand.

Although a false statement is the basis of a perjury conviction, legal issues usually focus upon whether the witness was duly sworn and under oath, whether the falsehood was material or whether there was knowing and wilful intent to make an untrue statement. Whereas materiality[305] and intent[306] are subject to different interpretations given varying circumstances, it is normally clear, once the facts are established, whether a statement is true or false. Case law has developed the test of literal truthfulness as the standard to be used in determining the truth or falsity of a particular statement. The Second Circuit, in *United States v. Bronston*[307] has, in effect, adopted a new test by holding that a non-responsive statement, although literally true, constituted a lie by negative implication.

Samuel Bronston was the President and sole owner of Samuel Bronston Productions, Inc., which, between 1958 and 1964, had bank accounts in several countries. In 1964, a proceeding to reorganize the corporation was brought under Chapter XI of the Bankruptcy Act.[308] During the course of a hearing before a referee, Bronston was asked several questions aimed at ascertaining the extent of the corporation's hidden assets. The questions and Bronson's answers, which gave rise to a perjury indictment and conviction, were as follows:

1. Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, sir.
2. Q. Have you ever? A. The company had an account there for about six months, in Zurich.

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[305] Materiality often becomes an issue when the perjury relates to a statement made before a grand jury. The test of materiality is whether the false testimony has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation. *See* United States v. Stone, 429 F.2d 138 (2d Cir. 1970); United States v. McFarland, 371 F.2d 701 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967); United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965).

The Second Circuit pointed out in the *Stone* decision that

> a false statement by a witness . . . even though not relevant in a essential sense to the ultimate issues pending before the grand jury, may be material in that it tends to influence or impede the course of the investigation.

429 F.2d at 140.

[306] Intent can be defined in terms of a statement that is knowingly false. A claim that a particular question was ambiguous often brings this issue to the fore. *See, e.g.*, United States v. Wall, 371 F.2d 398 (6th Cir. 1967).

[307] 453 F.2d 555 (2d Cir. 1971), *aff'g* 326 F. Supp. 469 (S.D.N.Y. 1971), *rev'd*, 41 U.S.L.W. 4148 (U.S. Jan. 10, 1973).

[308] 11 U.S.C.A. § 701 *et seq.* (1938).

3. Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.
4. Q. Have you ever? A. No, sir.[309]

At the perjury trial, the government established that, in 1959, defendant had in fact opened a Swiss bank account in his own name. The account remained active until 1962 and was closed in 1964.

The Second Circuit majority framed the perjury issue in these terms: "[W]hether an answer under oath, which is true — but only half true — can constitute perjury. . . ."[310]

The defendant contended that the "you" (in question number 2 above) was ambiguous. The court acknowledged that a "crucial element of the crime of perjury [was defendant's belief] concerning the verity of his sworn testimony"[311] and that, to support a perjury conviction, the question must be clear enough to elicit an answer defendant knows to be false.[312] In rejecting Bronston's claim that the question was ambiguous, the court stated that his answer clearly indicated that he understood the implication of the question;[313] therefore, the jury was entitled to find that when defendant testified that "the company" had had an account in Switzerland, he intended to give the impression that he personally had not.[314] Having decided that the question was not ambiguous, the court boldly went on to hold:

> For the purposes of 18 U.S.C. § 1621, an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury.[315]

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309 453 F.2d at 557.

310 *Id.* The materiality of the statement was conceded. Defendant also questioned the sufficiency of the evidence offered to prove that he had remembered the account at the time of the questioning which proof was essential to a showing of *intentional* misrepresentation. The court held the evidence sufficient to present a question of fact for the jury.

311 *Id.* The court cited United States v. Winter, 348 F.2d 204, 210 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965); *accord*, United States v. Wall, 371 F.2d 398, 401 (6th Cir. 1967).

312 453 F.2d at 557; *accord*, United States v. Sweig, 316 F. Supp. 1148, 1164 (S.D.N.Y. 1970), *aff'd*, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971) ("an answer that is nonresponsive [*sic*] may reflect only misunderstanding, not perjury"), *citing* United States v. Cobert, 227 F. Supp. 915 (S.D.Cal. 1964).

313 453 F.2d at 559. The jury was instructed that (1) the defendant must have understood the question and (2) if the question was less precise than it should have been, that should not be permitted to prejudice the defendant. 326 F. Supp. at 472.

314 453 F.2d at 558.

315 *Id.* at 559. The court cited only one case, United States v. Rao, 394 F.2d 354, 356-57 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968) to support this statement. But, in that case, the defendant was convicted for characterizing his visits to a certain restaurant as "periodical" when actually he was there almost every night. The issue presented in *Rao* was not one of non-responsiveness or even falsity but of sufficiency of evidence needed to convict.

The defendant's evasiveness was deemed especially noxious in the context of a bankruptcy proceeding which is a "searching expedition" to discover assets of which only the witnesses may have knowledge.[316] Where a half-truth results in side-tracking the question, it "is contrary to the 'whole truth' principle of the oath."[317] The dissent denounced as irrelevant the attempt to side-track the questioner[318] and framed the issue differently by asking whether a perjury conviction can stand if the answer is literally truthful but nonresponsive. Judge Lumbard decided it could not, "even if . . . motivated by a wilful attempt to conceal."[319]

The majority opinion detected two distinguishing factors in prior decisions which had reversed perjury convictions. In one line of cases, the defendant's answer was not only literally truthful but also wholly responsive to the question asked.[320] In the second line of decisions, the

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316 453 F.2d at 559; *cf.* United States v. Sweig, 316 F. Supp. at 1165 (duty in grand jury proceeding to testify to facts about which the grand jury is concerned, whether a specific question is asked or not). For a discussion of the distinction between the *Sweig* and *Bronston* decisions, see text accompanying note 321 *infra*.

317 453 F.2d at 559. Since the Bankruptcy Act does not specify the form an oath should take in bankruptcy proceedings, the defendant did not literally swear "to tell the whole truth." But the same legal consequences are presumed no matter what specific words are used, 453 F.2d at 559 n.4, *citing* 6 J. WIGMORE ON EVIDENCE § 1818 (3d ed. 1940):

> The two expedients of the oath and the perjury-penalty are similar in their operation; that is, they influence the witness subjectively against conscious falsification, the one by reminding of ultimate punishment by a supernatural power, the other by reminding of speedy punishment by a temporal power. The reminder, in the case of the perjury-penalty, is rarely found expressly uttered in the formula of words for administering an oath or an affirmation; it seems to be taken for granted as known to the witness.

WIGMORE ON EVIDENCE § 1831 (3d ed. 1940).

318 453 F.2d at 562 n.6. (Lumbard, J., dissenting). The referee's failure to notice that he was being diverted by defendant's response should have no bearing on the latter's guilt. *Id.* at 563. *Cf.* United States v. Slutzky, 79 F.2d 504, 505 (3d Cir. 1935) ("the questions put to [defendant] must *search* for the truth") (emphasis added).

319 453 F.2d at 560. He also stated that, once a statement is found to be true, there can be no conviction and the court should not inquire into defendant's state of mind to see if he hoped his answer would mislead his questioner. 453 F.2d at 561. But the lower court, whose opinion was affirmed by the majority, said precisely the opposite: "Thus, although a truthful and responsive answer may not be perjurious, a technically truthful but unresponsive one may." 326 F. Supp. at 472.

320 *See* Galanos v. United States, 49 F.2d 898 (6th Cir. 1931). Defendant in this case answered "I did not" to the query, "Don't you remember . . . that you made arrangements yourself for the making of a bond?" Actually he had participated in preliminary negotiations for procuring the bond and ultimately joined in indemnifying the surety in order to obtain it, but the court said ". . . his negative answer was literally true . . ." and reversed the conviction. 49 F.2d at 898.

> The court in United States v. Cobert, 227 F. Supp. 915 (S.D. Cal. 1964) held:
> This whole rambling answer has little or nothing to do with the question. It is true that defendant said "No", but the rest of his answer explains that statement. Plainly, you cannot tear one word out of context and predicate a perjury charge upon it. Defendant was asked if he discussed lay-offs, and answered that he does not, in fact, lay-off. That is nonresponsive at worst, and in no way shows that he committed perjury.

227 F. Supp. at 919. The *Bronston* dissent relied upon *Cobert* to support its claim that

question posed was ambiguous and, therefore, the defendant's answers were both literally true and responsive if the questions were construed in accordance with one of their possible interpretations.[321] The dissenting opinion, on the other hand, argued that literal accuracy was the sole test used in these cases and that "precision and responsiveness are not relevant to the crime of perjury."[322]

The false impression given by Bronston's deceptive answer could have been and possibly should have been remedied in the court room and not at a later perjury trial. Had Bronston been asked, "Do you remember if you ever had bank accounts in Swiss banks," a negative response would most likely have led to further questioning and an avoidance of a perjury conviction even though it, like the answer given to the question actually asked, could well have been misleading. The

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a non-responsive answer cannot be the basis for a perjury conviction. 453 F.2d at 562 n.7. *See* United States v. Wall, 371 F.2d 398 (6th Cir. 1967), which held that defendant could not be convicted for perjury based on an answer which was "literally accurate, technically responsive or legally truthful." 371 F.2d at 400, *citing* Smith v. United States, 169 F.2d 118 (6th Cir. 1948).

The *Bronston* majority distinguished the ambiguity of the words "on a trip" in *Wall* with the precision of the word "you" in the question posed to Bronston. In *Wall*, the defendant was asked "Have you ever been on trips with Mr. X?" and replied, "I have not." Since, the court said the question was capable of two interpretations, it was necessary to determine what the question meant to the witness. The defendant and Mr. X had, in fact, been in Florida together although they did not travel there together. Since the question might have meant "Have you ever accompanied Mr. X on a trip?" the "literally truthful" test spared the defendant. 371 F.2d at 399.

The dissenting opinion in *Bronston* favorably cited *Galanos* for the proposition that a perjury was not committed merely because the literally true answer would be somewhat modified if the defendant had been asked to state all the circumstances supporting his answer. 453 F.2d at 562.

321 *See* United States v. Cobert, 227 F. Supp. 915 (S.D. Cal. 1964). The majority in *Bronston* emphasized the ambiguity of one of the questions asked in *Cobert* which had elicited an alleged perjurious response; *i.e.*, the use of the unfamiliar phrase "listing post." 453 F.2d at 558-59.

The dissent in *Bronston* focused upon a different aspect of the *Cobert* case.

The following dialogue had occurred:

Q. Between you and Hy Kamin has there ever been any discussion about lay-offs?
A. About lay-offs?
Q. Yes, sir.
A. No. We don't lay-off. We cut the bet down at source. That's why I told you I'd rather take you at 10 percent and not him. His I'd sooner turn down.

227 F. Supp. at 917.

The *Bronston* dissent uses the following logic to distinguish cases which turned upon the ambiguity of a question: in those cases the defendants could be found to have answered both responsively and truthfully if one of the permissible interpretations of the question was used. If the perjurious interpretation was used, he would again be found to have answered responsively but falsely. Bronston's answer, on the other hand, was unresponsive although literally truthful. The dissent pointed out:

> Were we to focus on cases dealing with ambiguous questions the true analogy would be to a case where a question was found susceptible to two interpretations and the defendant's answer was responsive to neither.

453 F.2d at 562 n.4.

322 453 F.2d at 562.

answer "No" to the inept question "Do you remember . . ." is responsive to the question but is incapable of objective analysis as to its truthfulness. When confronted with such a response, a competent attorney would attempt to refresh the witness's recollection. Bronston's non-responsive answer should have been remedied, not by a perjury conviction but rather by another probative question pinning down the truth.

A witness's answer that he does not remember certain acquaintances or transactions can be a basis for a perjury conviction.[323] Even though defendant's answer is purely subjective, his knowledge of the facts presented in the question can be proven through circumstantial evidence showing a motive to lie together with evidence establishing the frequency and nearness to the present time of the acts in question. A jury could then conclude that the defendant had *lied* when he stated that he did not recall the acquaintances or transactions presented in the question.

Bronston, however, did not *lie* when he stated that the company had a Swiss bank account. His answer may be labeled as evasive or deceptive, but it was nevertheless literally true. His response was not a subjective statement which may or may not have been true depending upon its credibility.

The element of non-responsiveness in Bronston's answer was not the decisive factor underlying his conviction. Had Bronston replied "The Swiss Alps are a winter wonderland" to a question about his bank accounts, he certainly would not have been convicted of perjury. Rather, one must conclude that the element of deception, the negative implication contained in his answer, served as the sole basis for his conviction. A deceptive answer which is literally truthful does not merit a perjury conviction in light of the prior case law on this subject. Many defendants have uttered deceptive and misleading answers which, fortunately for them, were technically accurate. For example, in *United States v. Slutzky*,[324] the defendant was asked whether he had ever been convicted of a felony. His negative response must have seriously misled the average juror for he had in fact been convicted upon a very grievous charge. Yet Slutzky's perjury conviction was reversed because, in that jurisdiction, *no* crimes were classified as felonies.

The majority opinion in *Bronston* attempts to distinguish this genre of decisions by employing a responsive-non-responsive dichotomy.

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323 *See, e.g.*, United States v. Sweig, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

324 79 F.2d 504 (3d Cir. 1935).

But the responsiveness of an answer logically should be an irrelevant consideration when falsity is in issue.

One can sympathize with the majority's dissatisfaction with the court-created doctrine of literal truthfulness which at times has sheltered deceptive answers. Such a doctrine contradicts the spirit of the usual oath whereby one swears to tell the truth, the *whole* truth and nothing but the truth. However, one could ask why, in the context of an adversary system that applauds quick-witted and cunning lawyers for winning cases by sharp questioning techniques, should it be deemed objectionable that a witness who is often a potential defendant (and thus is, in his own eyes, in an adversary proceeding) manages to outwit his interrogator by an evasive but truthful answer?

Furthermore, since the element of falsity is basic to the success of a perjury action,[325] it is imperative that it be dealt with strictly and that it not be established by imprecise standards. Again and again, the test of "literal truthfulness" has been applied as the standard of falsity.[326] Now, whether its basis for upholding Bronston's conviction was that his answer was "a lie by negative implication" or "nonresponsive," the Second Circuit has, without valid precedent, broadened that standard. If the decision is affirmed by the Supreme Court[327] it would greatly expand the grounds for future perjury actions.[328]

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325 Perjured evidence as a ground for a new trial rests upon three factors, the first of which is that "the court is reasonably well satisfied that the testimony given by a material witness is false." T. HOUSEL & G. WALSER, DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES 716 (2d ed. 1946).

326 *See* United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967); Blumenfeld v. United States, 306 F.2d 892, 897 (8th Cir. 1962); Smith v. United States, 169 F.2d 118, 123 (6th Cir. 1948) (defendant's conviction was upheld only because the jury found that his answer was not literally true, the court having charged the jury that "if you find from the testimony that the defendant's answers to the agent's questions were literally true, you cannot find him guilty . . ."); Hart v. United States, 131 F.2d 59, 61 (9th Cir. 1942) (defendant had given money to her sister to buy and furnish a house. Defendant's testimony that she did not own the property was held "legally truthful" since the house was in her sister's name); United States v. Slutzky, 79 F.2d 504, 505 (3d Cir. 1935) (defendant answered "No" to the question of whether he had ever been convicted of a felony in New Jersey. Since New Jersey classified crimes as "misdemeanors" or "high misdemeanors" only, the answer was legally truthful, thereby necessitating a reversal of a conviction.); Galanos v. United States, 49 F.2d 898, 899 (6th Cir. 1931).

327 *Cert. granted*, 405 U.S. 1064 (1972).

328 *Bronston* has recently been cited favorably in United States v. Kahn, 340 F. Supp. 485, 490 n.4 (S.D.N.Y. 1971). The defendant claimed the question leading to the perjury conviction was ambiguous but it can be distinguished from *Bronston* because, once the claim of ambiguity was rejected, the answers were found to be *not* literally true. Defendant had claimed that payments made *after* negotiations were not "part and parcel" or "in connection with" negotiations, a "semantic game that [the] court will not countenance." 340 F. Supp. at 490 n.4.