ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3015

UNITED STATES OF AMERICA, **Appellee,**

v.

RUSSELL JAMES CASO, JR., **Appellant.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Crim. No. 07-CR-332 (RCL)

CERTIFICATE OF PARTIES,
RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee, the United States of America, hereby states:

A. Parties and amici: The parties to this appeal are appellant, Russell J. Caso, Jr., and appellee, the United States of America. The same parties appeared below. There are no intervenors or amici.

B. Rulings Under Review: Appellant challenges a written order entered by the Honorable Royce C. Lamberth on January 12, 2012, denying appellant's motion under 28 U.S.C. § 2255 to vacate and set aside judgment sentence.

C. Related Cases: There are no related cases. Appellant requested a Certificate of Appealability ("COA") from this Court on March 12, 2012. On March 26, 2012, the United States responded to appellant's request and acknowledged that a COA should issue. This Court granted a COA on April 24, 2012.

I N D E X

TABLE OF CASES

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* Cases chiefly relied upon are marked with an asterisk.

OTHER REFERENCES

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), appellee states that all pertinent statutes and regulations are contained in the Addendum to the Brief for Appellant.

ISSUE PRESENTED

In the appellee's opinion, this appeal presents the following issue:

Whether the district court erred in denying, as procedurally barred, appellant's motion to vacate his conviction under 28 U.S.C. § 2255, where (1) to overcome the procedural default, appellant was required, but failed, to show that he is actually innocent of equally serious charges that the government forwent; (2) the district court did not clearly err in finding that there is record evidence that the government forwent a charge of making a false statement, in exchange for a pre-indictment guilty plea to conspiracy to commit honest services wire fraud; and (3) making a false statement is equally as serious as conspiracy to commit honest services wire fraud, because both offenses carry equal statutory maximum penalties.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, **Appellee,**

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RUSSELL JAMES CASO, JR., **Appellant.**

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On December 4, 2007, the United States filed an information charging appellant with conspiracy to commit honest services wire fraud in violation of 18 U.S.C. §§ 371, 1343, 1346 (A. 7-11).[1/] Three days later, on December 7, 2007, appellant pleaded guilty to that charge, entering into a signed plea agreement and statement of offense with the United States (id. at 12-25; 12/7/07 Tr. 21).[2/]

[1/] "A." refers to the appendix filed by appellant.

[2/] Transcript citations refer to the date and page number for the proceedings in this case. A complete copy of the December 7, 2007, transcript is included in the record material for appellee.

At the sentencing hearing on July 30, 2009, the Honorable Henry H. Kennedy, Jr., sentenced appellant to three years of probation to include 170 days of location monitoring and 100 hours of community service (A. 4, 42-45). Appellant did not appeal his conviction or sentence.

On June 24, 2010, the United States Supreme Court decided Skilling v. United States, 130 S. Ct. 2896 (2010). On April 25, 2011, appellant filed a motion to vacate and set aside judgment and sentence pursuant to 28 U.S.C. § 2255 (S.A. 26-51).[3/] In that motion, appellant argued that Skilling established that the honest services fraud offense to which he pled guilty is not a crime. The government filed a written opposition to appellant's section 2255 motion on November 3, 2011, and attached a declaration from the lead prosecutor (S.A. 52-85). On January 12, 2012, the Honorable Royce C. Lamberth denied appellant's motion pursuant to section 2255 on procedural grounds (A. 46-59).[4/] The following day, appellant applied for a certificate of appealability ("COA") (A. 6). Judge Lamberth declined to issue a COA (A. 60-63). On March 12, 2012, appellant filed a motion seeking a COA from this Court (Docket at Doc. No. 1363140). On March 26, 2012, the United States

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[3/] "S.A." refers to the supplemental appendix filed by the government in this case.

[4/] The case was reassigned to Chief Judge Lamberth after Judge Kennedy's retirement (A. 6).

responded to appellant's request and acknowledged that a COA should issue (Docket at Doc. No. 1365563). This Court granted a COA on April 24, 2012 (Docket at Doc. No. 1370383).

COUNTERSTATEMENT OF THE FACTS

I. THE OFFENSE CONDUCT

Appellant acknowledged as part of his plea agreement that a written Statement of Offense proffered by the government "fairly and accurately describe[d] [his] actions and involvement in the offense to which [he was] pleading guilty" (A. 19). The Statement of Offense that appellant signed included the following information:

From January 2004 to January 2007, appellant was a legislative assistant and then Chief of Staff to Representative A, a member of the United States House of Representatives (A. 12). During appellant's period of employment, Representative A served on the governing council of Firm A, a non-profit consulting organization (id. at 12-13). Firm A was seeking federal funding for two proposals - Proposal A and Proposal B - and enlisted the assistance of Representative A and Representative A's staff to obtain that funding (id. at 13).

In approximately April 2005, Firm A hired appellant's wife to edit drafts of two funding proposals (A. 13). Appellant's wife finished editing the proposals in May 2005, and Firm A paid her

$1,500 (id.). From May to August 2005, Firm A paid appellant's wife additional amounts totaling at least $17,500, even though appellant's wife did little work in return for this money (id. at 13-14). Appellant knew that his wife received at least $19,000 from Firm A, and that the market value of the work that she performed for Firm A was far below that amount (id. at 14).[5/]

As Representative A's Chief of Staff, appellant was required to file annual Financial Disclosure Statements (A. 14). Schedule I of each Statement instructed appellant to:

> [L]ist the source, type, and amount of earned income from any source (other than the filer's current employment by the U.S. government) totaling $200 or more during the preceding calendar year. For a spouse, list the source and amount of any honoraria; list only the source for other spouse earned income exceeding $1,000. (Id.)

On his 2005 Statement, appellant intentionally omitted his wife's income from Firm A, even though he knew he was required to disclose it (A. 14-15). On May 15, 2006, appellant signed the Disclosure Statement under oath, certifying that the disclosures contained therein were true, complete and correct (id. at 15). Appellant omitted the information regarding his wife's income from

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[5/] Firm A discussed the prospect of appellant's wife performing additional work if the proposals received federal funding (A. 14). Neither proposal, however, received federal funding (id.). Firm A later asked appellant's wife to play a large role in Firm A's business, but she declined the invitation (id.).

Firm A, at least in part, because he knew that it revealed a conflict of interest between his official position and his wife's financial interests (id.).

During 2005, Representative A forwarded both proposals to the Department of State, and appellant organized various meetings in which appellant and Representative A solicited federal funding for the proposals from the Department of State and other Executive Branch agencies (A. 15).

II. APPELLANT'S GUILTY PLEA

On December 7, 2007, appellant and the United States entered into a written pre-indictment plea agreement (A. 18-25). Pursuant to the plea agreement, appellant agreed to plead guilty to conspiracy to commit an offense against the United States, that is conspiracy to commit honest services wire fraud, in violation of 18 U.S.C. § 371 (id. at 18). Appellant further agreed to "continue to cooperate completely, candidly, and truthfully" in investigations by the government (id. at 20). The government agreed that appellant would "not be further prosecuted criminally for the conduct set forth in the attached Statement of Offense or for any other conduct of which the government is aware on the date that [appellant's] guilty plea is entered" (id. at 18-19). The government also agreed to file a substantial assistance departure motion pursuant to USSG § 5K.1.1 if the government determined that

appellant provided substantial assistance in the investigation or prosecution of another person or entity (id. at 21).

The plea agreement included the statutory penalties: a maximum sentence of five years of imprisonment, a fine of $250,000 or a fine of twice the pecuniary gain or loss pursuant to 18 U.S.C. § 3571(d), a $100 special assessment, a three-year term of supervised release, an order of restitution, and an obligation to pay any applicable interest or penalties on fines or restitution not timely made (id. at 18). The plea agreement also discussed the guidelines and policies promulgated by the United States Sentencing Commission, noting that although the court would consider the applicable guidelines, the Sentencing Guidelines were not binding on the court and the court could impose any sentence, up to and including the statutory maximum sentence, which might be greater than the applicable guidelines range (id. at 19, 21).

Pursuant to the plea agreement, the United States filed a one-count information charging appellant with conspiracy to commit the offense of honest services wire fraud, in violation of 18 U.S.C. §§ 371, 1343, and 1346 (A. 7-11). The information alleged that appellant "intentionally failed to disclose that his wife received payments from Firm A even though he knew that he was required to do so" (id. at 9).

In conjunction with appellant's guilty plea, the United States also filed Proposed Elements of the Offense (A. 26-28). In its Proposed Elements, the United States stated that appellant's failure "to disclose a conflict of interest that resulted in personal gain" constituted a "scheme to fraudulently deprive another of the intangible right of honest services" under 18 U.S.C. §§ 1343, 1346, and that the non-disclosure was material to the charged conspiracy to commit honest services wire fraud (id. at 27).

At the plea hearing on December 7, 2007, Judge Kennedy read paragraph one of the Proposed Elements of the Offense: "The defendant knowingly participated in a scheme to fraudulently deprive another of the intangible right of honest services, that is to fail to disclose a conflict of interest that resulted in personal gain," and then commented, "I am not certain that I understand what the personal gain, the reference to 'that resulted in personal gain' actually refers to" (12/7/07 Tr. 9). Appellant's counsel responded, "Your Honor, as we discussed with Government counsel, the intention in this element was to describe that Mr. Caso failed to disclose on the financial disclosure form that his wife had received income from [F]irm A. The personal gain would be the receipt of income that Mr. Caso's wife --" (id.). The court then inquired of the prosecutor whether that was his understanding,

to which the prosecutor replied, "That is correct, and I should add Mr. Caso and his wife have joint finances, so in that sense money to her would be a gain to Mr. Caso" (id. at 9-10).

III. APPELLANT'S SENTENCING

At the sentencing hearing on July 30, 2009, and in his Memorandum in Aid of Sentencing (S.A. 1-25), appellant argued that his offense level should be determined by application of USSG § 2B1.1 (offenses involving fraud or deceit), rather than § 2C1.1 (offenses involving bribery and extortion including deprivation of the intangible right to honest services of public officials) (7/30/09 Tr. 4). Appellant's counsel acknowledged that "the conduct in this case is fundamentally a false statement on a financial disclosure form" and argued that the court should look to cases that involved similar conduct when determining whether to apply section 2B1.1 or section 2C1.1 (id. at 5-6).[6/] At the sentencing hearing, appellant asserted that his conduct was

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[6/] Appellant's memorandum similarly argued that "this case, which is at its heart a case about a false financial disclosure form, is governed by Section 2B1.1" rather than section 2C1.1 (S.A. 11). Appellant argued that "[t]he offense *conduct* here is a false statement: Mr. Caso failed to disclose that his wife received income from Firm A on his Congressional disclosure forms" (id. at 12). In support of his argument that section 2B1.1 applied, appellant cited a number of cases involving false statement charges under 18 U.S.C. § 1001 (id. at 12-15). Appellant also acknowledged that "[i]n this case, the choice between these two guidelines may be largely academic, because the parties agree that incarceration is not appropriate given Mr. Caso's cooperation" (id. at 11).

essentially the same as the conduct involved in United States v. Peters, No. 06-301-EGS, a case where the defendant pled guilty to violating 18 U.S.C. §§ 208 and 1001 (id. at 6).

The court, recognizing that both parties were requesting a probationary sentence, inquired whether there was "anything riding on" the guideline calculation in this case (7/30/09 Tr. 7-8). Appellant's counsel replied "[l]argely not" and reasoned that because "the Guidelines are no longer mandatory, and the Court will be sentencing pursuant to the Sentencing Reform Act . . . . [the guideline calculation] is probably simply an academic argument" (id. at 8). The government acknowledged that the guideline calculation was "in a practical sense . . . academic" given the government's section 5K1.1 departure motion, but took the position that section 2C1.1 should apply (id. at 29-30).

Judge Kennedy sentenced appellant to three years of probation to include 170 days of location monitoring and 100 hours of community service (A. 42-45). Judge Kennedy "adopt[ed] the Probation Officer's resolution of [which guideline to apply] without further comment" (7/30/09 Tr. 47), and sentenced appellant under section 2C1.1.

IV. APPELLANT'S SECTION 2255 MOTION

On April 25, 2011, appellant filed a motion to vacate and set aside judgment and sentence pursuant to 28 U.S.C. § 2255 (S.A. 26-

57). Appellant asserted that his conviction and sentence must be vacated because Skilling held that a failure to disclose a conflict of interest does not constitute a deprivation of the "intangible right of honest services" under 18 U.S.C. § 1346, as related to mail or wire fraud, unless it involves a bribe or kickback.

On November 3, 2011, the United States filed an opposition arguing that appellant's section 2255 motion was procedurally barred (S.A. 52-85). The United States asserted that "[a]lthough the defendant may be 'actually innocent' of the honest services wire fraud upon which his conspiracy conviction was based, as that offense now is defined under Skilling, the defendant cannot demonstrate that he is actually innocent of the charge the Government agreed to forego in return for the defendant's guilty plea – namely, False Statement under 18 U.S.C. § 1001" (id. at 67). In support of its contention that the United States forwent the equally serious charge of false statement in exchange for the defendant's plea of guilty to honest services wire fraud, the United States attached a declaration from the lead prosecutor in charge of the criminal investigation and prosecution of appellant (id. at 83-85).

Appellant filed a reply on December 5, 2011 (S.A. 86-102). Appellant argued that the "burden of showing actual innocence of charges foregone during plea bargaining extends only to charges

contained *in an indictment or information* that were dismissed pursuant to the plea agreement" (id. at 87 (emphasis in original)). Appellant further argued that a false statement in violation of 18 U.S.C. § 1001 is not more serious, or even equally as serious, as conspiracy to commit honest services wire fraud (id.).

V. THE DISTRICT COURT'S ORDER DENYING APPELLANT'S MOTION

On January 12, 2012, Chief Judge Lamberth issued a written memorandum and order denying appellant's motion (A. 46-59). Recognizing that appellant had procedurally defaulted his Skilling claim, the court found that appellant must establish "actual innocence" under the framework set forth in Bousley v. United States, 523 U.S. 614, 622 (1998) (A. 51).

Noting that in Bousley the Court "stressed that 'there is no record evidence' that the government dropped [a] charge in exchange for the defendant's plea," the court held that "[i]t thus cannot be the case that the absence of a charge in an indictment or information is dispositive" (A. 53). The court found that there was "ample record evidence" that the government forwent a false statement charge as part of the plea agreement (id. at 54). Specifically, the court found that the Statement of Offense presented "a *prima facie* case of false statement" and that the information "also allege[d] this same conduct" (id. at 54-55). The

court also found that the declaration from the lead prosecutor was "eminently credible given the extent to which the statement of the offense and other related documents appear to establish a violation of § 1001" (id. at 54).

The court then found that the actual innocence showing applies to equally serious charges as well as more serious charges (A. 55-56 (citing Lewis v. T.C. Peterson, 329 F.3d 934, 936-37 (7th Cir.), cert. denied, 540 U.S. 1047 (2003)). Finally, the court found that the relative seriousness of offenses is determined by reference to the statutory maximum sentences, rather than the applicable guideline ranges (id. at 57-59). Accordingly, the court held that appellant could not establish his actual innocence of the equally serious crime of making a false statement and, therefore, failed to excuse his procedural default (id. at 59).

SUMMARY OF ARGUMENT

The district court did not err in denying appellant's section 2255 motion. The district court recognized that appellant's Skilling claim in his section 2255 motion is procedurally barred. Although a showing of actual innocence may excuse his procedural default, appellant has not made, and cannot make, a colorable showing of actual, factual innocence.

To excuse his procedural default, appellant must show both that he is actually innocent of the charge to which he pleaded guilty and that he is actually innocent of any charges of greater or equal seriousness that the government dismissed or withheld from charging in exchange for the guilty plea. Here, the record demonstrates that the government forwent charging appellant with making a false statement in exchange for appellant's pre-indictment guilty plea to conspiracy to commit honest services wire fraud. Making a false statement under 18 U.S.C. § 1001 and conspiracy to commit honest services wire fraud under 18 U.S.C. § 371 both have a statutory maximum sentence of five years and, therefore, are equally serious offenses. Accordingly, because appellant cannot show that he is actually innocent of making a false statement, his claim is procedurally barred.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION PURSUANT TO 28 U.S.C. § 2255, BECAUSE APPELLANT CANNOT EXCUSE HIS PROCEDURAL DEFAULT BY SHOWING THAT HE IS ACTUALLY INNOCENT OF MAKING A FALSE STATEMENT

A. Standard of Review and Applicable Legal Principles

The trial court's findings of fact in a 28 U.S.C. § 2255 proceeding are reviewed for clear error, while its conclusions of law are reviewed de novo. United States v. Weaver, 234 F.3d 42, 46 (D.C. Cir. 2000). The decision to convene an evidentiary hearing on a section 2255 motion "is committed to the district court's discretion." United States v. Pollard, 959 F.2d 1011, 1030-31 (D.C. Cir.), cert. denied, 506 U.S. 915 (1992).

"Once the defendant's chance to appeal has been waived or exhausted" this Court is "entitled to presume he stands fairly and finally convicted, especially when . . . he already has had a fair opportunity to present his federal claims to a federal forum." United States v. Frady, 456 U.S. 154, 164 (1982). "Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal." Bousley, 523 U.S. at 621 (internal quotation marks and citation omitted). "Indeed, the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." Id. Thus, where a defendant has procedurally defaulted a claim by failing to raise it

on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent. Id. at 622 (citing Smith v. Murray, 477 U.S. 527, 537 (1986); Murray v. Carrier, 477 U.S. 478, 485 (1986); Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

To establish actual innocence, appellant must demonstrate that, "in light of all the evidence," "it is more likely than not that no reasonable juror would have convicted him." Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). In cases where the government has forgone more serious or equally serious charges in exchange for a guilty plea, appellant must also demonstrate that he is actually innocent of those forgone charges. Id. at 624, Lewis, 329 F.3d at 937.

"Actual innocence" means factual innocence, not mere legal insufficiency. Bousley, 523 U.S. at 623-24 (citations omitted). "In other words, the Government is not limited to the existing record to rebut any showing [of actual innocence] that petitioner might make." Id. at 624. Rather, "the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy[.]" Id.

B. Discussion

Appellant's failure to raise his Skilling claim on direct appeal bars appellant from raising that claim collaterally. Appellant can obtain review of his claim only by showing that he is actually innocent of the charge to which he pleaded guilty and that he is actually innocent of any charges of greater or equal seriousness that the government dismissed or withheld from charging in exchange for the guilty plea. Bousley, 523 U.S. at 624; Lewis, 329 F.3d at 937.[7/] Although appellant has shown that he is actually innocent of conspiracy to commit honest services wire fraud, appellant has not overcome his procedural default, because he cannot show that he is actually innocent of the equally serious charge of making a false statement.

1. Appellant Must Show That He is Actually Innocent of Equally Serious Charges That the Government Forwent in Order to Overcome His Procedural Default Pursuant to the Actual-Innocence Exception

In Bousley, the Court explained that "[i]n cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also

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[7/] **A defendant may also obtain relief on a claim that has been procedurally defaulted if he can "'show both (1) "cause" excusing his double procedural default, and (2) "actual prejudice" resulting from the errors of which he complains." United States v. Pettigrew, 346 F.3d 1139, 1144 (D.C. Cir. 2003) (quoting Frady, 456 U.S. at 167-68). Appellant makes no such assertion here.**

extend to those charges." 523 U.S. at 624. Appellant reads this sentence in Bousley to mean that he must establish actual innocence *only* of more serious offenses. Appellant's argument, however, ignores a complete reading of the Supreme Court's decision in Bousley and the logic behind the decision.

Bousley itself contemplated that a defendant collaterally attacking his conviction would not only have to establish his innocence of that offense, but also of any other charge that might have resulted in equal or greater punishment that the government had forgone during plea negotiations. In Bousley, the government contended that the defendant was required to show not only that he was actually innocent of "using" a firearm, in violation of 18 U.S.C. § 924(c)(1) - the conduct with which he was charged - but also that he was actually innocent of "carrying" a firearm, also in violation of 18 U.S.C. § 924(c)(1) - an offense that carries the same penalty as "using" a firearm. The Court rejected this argument because "there is no record evidence that the Government elected not to charge [defendant] with 'carrying' a firearm in exchange for his plea of guilty." Id. at 624. That language clearly contemplated that, if the government had forgone a valid "carry" charge in favor of an invalid "use" charge, Bousley would have been required to establish his innocence on the carry charge - an offense as serious as, but not more serious than, the use charge

- in order to obtain relief. The Court never suggested that it was irrelevant whether the government had elected not to charge the defendant with "carrying" a firearm because that offense was not more serious than "using" a firearm.

This result is also supported by the logic of the Bousley opinion. In Lewis, the Seventh Circuit held that:

> The logic of the Bousley opinion does not require that the charge that was dropped or forgone in the plea negotiations be more serious than the charge to which the petitioner pleaded guilty. It is enough that it is as serious. For if it is as serious, the petitioner would have gained little or nothing had the government and he realized that the charge to which he pleaded guilty was unsound. Had they realized this they would have switched the plea to the sound charge, and as long as it was an equally serious charge, as it was here, the punishment would probably have been the same, subject to our earlier acknowledgment that the government might drive a harder plea bargain if it had two good counts to brandish rather than just one. But this is true whether the valid count charges a more serious crime than the invalid one or a crime that is as serious; only if it charges a less serious crime is there a strong reason to believe that the defendant was punished more severely by virtue of having pleaded guilty to the count later learned to be invalid. Thus the Court's reasoning does not support limiting the rule of Bousley to the case in which the dropped or otherwise forgone charge was more serious, rather than as or more serious, than the charge to which he pleaded guilty.

329 F.3d at 937. Other courts have similarly interpreted Bousley. See Alcock v. Spitzer, 349 F. Supp. 2d 630, 637 (E.D.N.Y. 2004) ("There is no cogent basis for distinguishing between 'more serious' charges and 'as serious' charges foregone by the prosecutor when evaluating whether adherence to the independent and

adequate state ground doctrine will result in a fundamental miscarriage of justice."); Bellomo v. United States, 297 F. Supp. 2d 494, 500 (E.D.N.Y. 2003) ("in consideration of the petitioner's plea, the government forwent prosecuting him on other charges which were as serious or more serious than the one he seeks to vacate and his showing of innocence must also extend to those charges" (discussing Lewis, 329 F.3d at 936)); see also Hampton v. United States, 191 F.3d 695, 703 (6th Cir. 1999) (requiring petitioner to establish that he is actually innocent of the two forgone counts in the indictment that charged violations of different subsections of the same statute and carry maximum sentences that are less than or equal to the maximum sentence for the charge of conviction, without further discussion of the rationale of Bousley).[8/]

Requiring a petitioner to show actual innocence of equally serious forgone counts is also reasonable and just as a policy

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[8/] Appellant's suggests that Lewis's holding is based on the "notion that a defendant enters into plea negotiations determined to plead guilty" and will "accept the charges that the government offers interchangeably so long as they are of equal severity" (Brief for Appellant at 43-44). Lewis, however, acknowledged the possibility that a defendant may not have wanted to plead guilty if he had known that one offense was invalid. 329 F.3d at 936. Nonetheless, Lewis recognized that where a defendant raising a procedurally barred claim cannot demonstrate that he is innocent of another equally serious offense, allowing the defendant to vacate his conviction "would . . . confer a windfall on him." Id.

matter.[9/] Where a petitioner cannot show that he is actually innocent of an equally serious charge, setting aside his conviction would "allow the defendant to use [a subsequent change in the interpretation of the statute of conviction] to get off scot free" and "would . . . confer a windfall on him." Lewis, 329 F.3d at 936. Moreover, this requirement would also prevent the government from involuntarily forgoing time-barred valid counts where, had the government foreseen the subsequent change in the interpretation of the statute of conviction, the government would have required the defendant to plead guilty to the equally serious, now time-barred charge. In short, appellant should not be allowed to raise a procedurally defaulted challenge to a conviction and sentence that

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[9/] Appellant's due process arguments (at 28-29) are misplaced, as they ignore the context of this appeal – a collateral attack involving a procedurally defaulted claim. Standards such as the "beyond-a-reasonable doubt requirement" cited by appellant do not govern here. Rather, the burden falls on appellant to establish that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. This standard is only met if appellant can demonstrate "that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." Schlup, 513 U.S. at 327; see also Bousley, 523 U.S. at 623-24. Indeed, the Supreme Court has repeatedly made clear that the burden of proof remains on the petitioner throughout a habeas corpus proceeding. See House v. Bell, 547 U.S. 518 (2006) (burden of proof from Schlup remains on petitioner); Walker v. Jonston, 312 U.S. 275, 286 (1941) ("On a hearing [the petitioner] would have the burden of sustaining his allegations by a preponderance of evidence"); Johnson v. Zerbst, 304 U.S. 458, 469 (1938) ("If in a habeas corpus hearing, he does meet this burden . . ., it is the duty of the court to grant the writ.").

he bargained for, when he actually committed another offense that would have exposed appellant to the same possible punishment had it not been forgone in exchange for his plea.

Appellant urges this Court to follow United States v. Lloyd, 188 F.3d 184 (3d Cir. 1999). The Third Circuit, however, was not confronted with the precise question raised here and in Lewis – that is, whether appellant must show his actual innocence of equally serious forgone charges. In Lloyd, the Third Circuit found that the dismissed charge was a less serious charge, and that "[t]he District Court's requirement that Lloyd demonstrate innocence of *any* dismissed charges was at odds with the Supreme Court's express formulation of the procedural conditions for relief." Id. at 189 n.11. Although the Third Circuit noted that Bousley's apparent "dictum" regarding "more serious charges" "must be respected as a considered pronouncement to be followed in the federal system until and unless modified by the Supreme Court itself," it did not address Bousley's discussion of whether the government had forgone equally serious charges. Id.[10/] Where the

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[10/] Similarly, in United States v. Johnson, 260 F.3d 919 (8th Cir. 2001), the Eighth Circuit did not address whether a showing of innocence of an equally serious charge is necessary to excuse procedural default. In Johnson, the government argued that the forgone charge was more serious. The Eighth Circuit, without any discussion of Bousley's application to equally serious charges, held only that the forgone charge was not more serious. Id. at 921.

government forwent equally serious charges, appellant's showing of actual innocence must extend to those charges.

2. The District Court Did Not Clearly Err in Finding That The Government Forewent the Charge of False Statement in Exchange for Appellant's Pre-Indictment Plea of Guilty

Here, the government forwent the charge of making a false statement in exchange for appellant's pre-indictment plea to conspiracy to commit honest services wire fraud. In determining whether the government forwent other charges in exchange for the defendant's plea of guilty, Bousley itself looked beyond the charging document to record evidence. Appellant's argument to the contrary is not supported by a full reading of the Court's decision in Bousley or by the practical realities of pre-indictment plea bargains.

The Court in Bousley stated that:

> In this case, the Government maintains that petitioner must demonstrate that he is actually innocent of both "using" and "carrying" a firearm in violation of § 924(c)(1). But petitioner's indictment charged him only with "using" firearms in violation of § 924(c)(1). *And there is no record evidence* that the Government elected not to charge petitioner with "carrying" a firearm in exchange for his plea of guilty. *Accordingly*, petitioner need demonstrate no more than that he did not "use" a firearm as that term is defined in Bailey.

523 U.S. at 624 (emphasis added). Thus, if there had been "record evidence" (other than the indictment itself) that the government forwent charging "carrying" a firearm, the defendant would have

been required to demonstrate that he did not "carry" a firearm as well.

Appellant thus errs in characterizing Bousley as "limit[ing]" itself to a review of the indictment alone (Brief for Appellant at 17-18), and in repeatedly characterizing consideration of whether there is record evidence other than the indictment (as Bousley did) as somehow "extend[ing]" Bousley beyond its terms (id. at 21, 22, 23, 24). To the contrary, it is appellant's suggested limitation to the face of the charging document (id. at 19 n.3, 24-27) that would rewrite Bousley, by ignoring Bousley's express recognition that "record evidence" other than the indictment may indicate which charges were forgone by the government. Indeed, appellant's entire argument on this point is undermined by his concession (at 18) that "Bousley allows for the possibility that other 'record evidence' could show that a charge was forgone." Rather than acknowledging that his attempt to limit Bousley solely to the face of the indictment is expressly foreclosed by Bousley, appellant openly invites this Court to adopt what he characterizes as a "better rule" than the one mandated by the Supreme Court in Bousley (id. at 19 n.3, 24-27). In challenging the "simpl[icity]" and "fair[ness]" of Bousley's directive to consider "record evidence" beyond the indictment, appellant reflects the views of the Bousley dissent, rather than the majority. See Bousley, 523 U.S. at 635 (Scalia,

J., dissenting) (noting the practical difficulty in identifying forgone charges and arguing that defendants would have to rebut charges made in indictments and, "if they could be identified, . . . charges *never made*").

In United States v. Panarella, the court similarly recognized that it must look beyond the four corners of the charging document in certain circumstances. No. 00-655, 2011 WL 3273599 (E.D. Pa. Aug. 1, 2011). There, the superseding information only charged an undisclosed self-dealing theory in violation of 18 U.S.C. § 1346, but the court went on to note that "[t]he United States has made no argument that it deliberately elected not to charge Panarella with a bribery or kickback scheme in exchange for his plea of guilty." Id. at *8.

The cases cited by appellant do not compel a contrary result. In United States v. Duarte-Rosas, the court stated that "[r]equiring Duarte to show actual innocence of all possible crimes that the government might have been able to include in an indictment is more than the law requires." 221 Fed. Appx. 521, 522 (9th Cir. 2007) (unpublished). The government did not assert that it deliberately elected not to charge the defendant in Duarte-Rosas or in Panarella with a specific charge as part of the plea agreement. Thus, neither Duarte-Rosas nor Panarella address the issue presented here – whether a defendant must show actual

innocence of a specific charge or charges that the government forwent in exchange for a plea of guilty.[11/]

Appellant's argument also ignores the practical realities of pre-indictment plea bargaining. In cases where a plea agreement is reached before an indictment is returned, the charging document typically does not memorialize the full charging decision or contain charges that the government is forgoing as part of the plea agreement. Rather, the charging document filed as part of a pre-indictment plea agreement typically contains only the charge or charges to which the defendant has agreed to plead guilty.[12/]

Thus, especially in the context of a pre-indictment guilty plea, the charging document is not the only evidence that a court should look to in determining what charges the government forwent. As appellant concedes, evidence of forgone offenses could include

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[11/] In United States v. Lynch, the court cited Duarte-Rosas and Panarella without further analysis. 807 F. Supp. 2d 224 (E.D. Pa. 2011). Although the court "reject[ed] the Government's argument that defendants must prove their actual innocence of any viable theory of honest services fraud regardless of whether charged," the court acknowledged that a petitioner must demonstrate actual innocence not only of "crimes actually charged," but also of crimes "consciously forgone by the Government in the course of plea bargaining." Id. at 230-31.

[12/] Accordingly, the post-indictment cases cited by appellant (at 21 n.4) are not persuasive here. In those cases, the indictment memorialized all of the charges contemplated by the government. Moreover, in those cases the government did not assert that there were additional charges that it consciously elected to forgo in exchange for a plea of guilty.

statements in a plea agreement or on the record detailing specific offenses that would not be charged in exchange for a plea of guilty (Brief for Appellant at 19 n.3). Such evidence may also be found by looking at documents such as the statement of offense or the plea discussions between defense counsel and the government.

Here, the district court did not clearly err in finding that "ample record evidence exists that the government considered prosecuting the defendant with a false statement charge but dropped that charge in exchange for the defendant's plea" (A. 54). The plea agreement and Statement of Offense demonstrate that the government forwent charging appellant with making a false statement in exchange for his plea. The plea agreement provides that appellant would "not be further prosecuted criminally for the conduct set forth in the attached Statement of Offense or for any other conduct of which the government is aware on the date that [appellant's] guilty plea is entered" (A. 18-19). The Statement of Offense clearly establishes all of the elements of making a false statement in violation of 18 U.S.C. § 1001. See United States v. Stadd, 636 F.3d 630 (D.C. Cir. 2011) (offense requires proof that the defendant knowingly and wilfully made a material false statement and that there is government agency jurisdiction). Specifically, the Statement of Offense establishes that appellant "intentionally failed to disclose that his wife received payments

from Firm A" "even though he knew that he was required to do so" (A. 14-15). Similarly, the Information filed in this case also clearly sets forth the elements of a false statement offense. The Information charges that on or about May 15, 2006, appellant "signed and filed with the U.S. House of Representatives the Disclosure Statement covering the calendar year 2005," in which he certified that the statements contained therein were true, complete, and correct, "even though [appellant] intentionally failed to disclose that his wife had received payments from Firm A" (id. at 10-11).

The declaration from the lead prosecutor further establishes that the government consciously forwent charging appellant with making a false statement as part of the plea agreement in this case and that this was discussed with appellant's counsel (S.A. 84-85). The district court, after reviewing the record and declaration found that "[t]he affidavit is eminently credible given the extent to which the statement of the offense and other related documents appear to establish" a false statement offense (A. 54). Appellant has never disputed the statements in the declaration.[13/]

[13/] Nothing in Bousley suggests that the Court would have refused to consider a declaration from the government stating that the government forwent additional charges. Moreover, appellee is unaware of any case where a court has refused to consider an affidavit presenting evidence of forgone charges. Rather, habeas proceedings often involve evidentiary hearings and further factual (continued...)

Indeed, appellant repeatedly encouraged the district court to view the case as involving a false statement rather than conspiracy to commit honest services wire fraud, thus reinforcing the parties' understanding that the government could have prosecuted appellant for making a false statement. At the sentencing hearing, appellant's counsel acknowledged that "the conduct in this case is fundamentally a false statement on a financial disclosure form" (7/30/09 Tr. 5). Similarly, in his memorandum in aid of sentencing, appellant argued that "this case . . . is at its heart a case about a false financial disclosure form," citing a number of cases involving false statement charges under 18 U.S.C. § 1001 (S.A. 11-15). Accordingly, there is ample evidence that the government deliberately forwent charging appellant with making a false statement and it can hardly be said that appellant was not aware that he could also be prosecuted for making a false statement.

Looking beyond the charging document for evidence of forgone charges is not unworkable, as appellant contends (Brief for Appellant at 24-27). As an initial matter, Bousley requires that in addition to the indictment, a court consider whether there is

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[13/](...continued)
development of the record. See, e.g., Bousley, 523 U.S. at 624 ("government is not limited to the existing record to rebut any showing [of actual innocence] that petitioner might make").

"record evidence" that the government forwent additional charges. 523 U.S. at 624. Accordingly, appellant errs in inviting this Court to disregard that mandate for the sake of convenience. In any event, the inquiry is not burdensome. Here, the government submitted a declaration in the district court and pointed to other evidence in the written plea agreement, Statement of Offense, and information. Appellant subsequently filed a reply and never disputed the statements contained in the declaration that the government forwent a false statement charge in exchange for appellant's guilty plea. Moreover, appellant did not request an evidentiary hearing or opportunity to present any contrary evidence. Instead, appellant contends that this Court should ignore the district court's finding that "the government considered but dropped a false statement prosecution in exchange for the defendant's plea" (A. 55) because that charge was not contained in the charging document (Brief for Appellant at 17). This argument is contrary to Bousley and is especially unworkable here, given that appellant entered into a pre-indictment plea.

3. The Offense of False Statement is Equally as Serious as the Offense of Conspiracy to Commit Honest Services Wire Fraud

To excuse his procedural default, appellant must prove his innocence of making a false statement – a charge that is equally as serious as conspiracy to commit honest services wire fraud. The

offenses of false statement and conspiracy to commit honest services wire fraud carry equivalent statutory maximum sentences and, therefore, are equally serious offenses. See 18 U.S.C. § 371 (whoever conspires to commit an offense against the United States or to defraud the United States "shall be fined under this title or imprisoned not more than five years, or both") and 1001 (whoever commits this offense "shall be fined under this title, imprisoned not more than five years").

Statutory maximum penalties are the appropriate measure of the seriousness of an offense. The statutory maximum penalty for a particular offense reflects Congress's judgment regarding the maximum sentence that a court may lawfully impose. The maximum penalties serve to limit the sentencing court's discretion and authority, as opposed to the sentencing guidelines, which are advisory in nature.

Congress has spoken further on the relative seriousness of federal criminal statutes by enacting sentencing classifications at 18 U.S.C. § 3559. Tellingly, Congress chose to base the sentencing classification system on statutory maximum penalties, signaling Congress's judgment that statutory maxima are the factor by which the seriousness of offenses should be compared. It is the statutory maximum penalty that determines, for example, whether an offense is classified as a felony or a misdemeanor. The sentencing classification system also affects a variety of other

determinations in the federal sentencing regime, perhaps most notably the length of terms of supervised release, which are themselves a significant part of any federal sentence. 18 U.S.C. §§ 3559(b); 3583(b).

The Sixth Circuit and other courts have looked to the statutory maximum penalties to determine the relative seriousness of offenses. In Vanwinkle v. United States, the court relied on statutory maximum penalties to determine the relative seriousness of the charges at issue. 645 F.3d 365, 369 n.2 (6th Cir. 2011) (noting that the petitioner "concedes that the more serious issue [is determined] by looking at the maximum statutory sentence for each offense" (internal quotation marks omitted)); see also Peveler v. United States, 269 F.3d 693, 700 (6th Cir. 2001) (looking to statutory penalties - in this case statutory mandatory minimum sentences - to determine relative seriousness of offenses). Similarly, in Alcock, the court analyzed the seriousness of the offenses at issue according to their classifications under New York Penal Law and found that the charges were equally serious because they were all classified as Class B violent felonies, punishable by a term of imprisonment of 5 to 25 years. 349 F. Supp. 2d at 637 n.4.

Here, making a false statement under 18 U.S.C. § 1001 and conspiracy to commit honest services wire fraud under 18 U.S.C.

§§ 371, 1346, both have a statutory maximum sentence of five years and, therefore, both are classified as Class D felonies. 18 U.S.C. § 3559(a)(4). As Class D felonies, both offenses carry a maximum term of supervised release of three years. 18 U.S.C. § 3583(b)(2).[14/]

Appellant's argument that looking to statutory maxima to determine the relative seriousness of offenses "would yield plainly illogical results" because, in cases involving conspiracy offenses under section 371, "it would mean that the object of the conspiracy has no bearing on the seriousness of the offense," is without merit (Br. at 36-37). Appellant ignores that section 371 itself takes into account the seriousness of the object of the conspiracy by decreasing the maximum punishment where the offense that it is the object of the conspiracy is a misdemeanor. 18 U.S.C. § 371. Moreover, appellant's suggestion that a conspiracy "predicated on honest-services fraud would be deemed equally serious as the same conspiracy offense predicated on murder or terrorism," wholly ignores the separate statutory maxima provided for conspiracy to murder, 18 U.S.C. § 1117 ("imprisonment for any term of years or

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[14/] Appellant argues (at 39-40) that this Court should look to the statutory maximum for the object offense of mail or wire fraud. However, appellant did not plead guilty to mail or wire fraud. Rather, appellant only plead guilty to conspiracy to commit honest services wire fraud, which carries a statutory maximum sentence of five years.

for life") and for conspiracies predicated on acts of terrorism, see, e.g., 18 U.S.C. § 2332(b)(2) (conspiracy to kill a national of the United States punishable by imprisonment "for any term of years or for life"); 18 U.S.C. § 2332b(c)(F) (conspiracy to commit an act of terrorism transcending national boundaries punishable "for any term of years up to the maximum punishment that would have applied had the offense been completed").

Appellant urges this Court to adopt the Guidelines-based reasoning employed by the courts in Lloyd and Halter. This approach, however, is severely undercut by the Supreme Court's subsequent decision in United States v. Booker, 543 U.S. 220 (2005), rendering the Guidelines merely advisory.[15/] The rationale for relying on the Guidelines – that Congress "adopted the Guidelines as the proper sentencing procedure to be followed by all federal courts in determining actual punishment for federal crimes," as stated in United States v. Halter, 217 F.3d 551, 553

[15/] Appellant also cites two cases that adopted a Guidelines-based approach post-Booker: United States v. Castillo, No. 09-CV-4222, 2011 WL 4592829 (E.D.N.Y. Sep. 30, 2011) and United States v. Short, No. 09-CV-763, 2010 WL 682311 (E.D. Mo. Feb. 23, 2010). However, neither of those cases addressed the impact of Booker on the Third and Eighth Circuit's reasoning in Lloyd and Halter, respectively. In Castillo, the court simply "[f]ollow[ed] the majority of circuits which have decided this issue," citing Halter and Lloyd. 2011 WL 4592829, at *4. Similarly, in Short, the district court, which was bound by Eighth Circuit precedent, followed Halter without discussion. 2010 WL 682311, at *3.

(8th Cir. 2000) – is simply no longer in accordance with the law.[16/] District courts now have the authority to depart upward or downward from the applicable guideline range. Thus, as the district court here recognized, "[t]he guidelines no longer absolutely constrain a sentencing court's authority, but the maximum sentences found in criminal statutes continue to do so" (A. 58).

Moreover, the sentencing guidelines are not a measure of the seriousness of the offense itself. Rather, the aim of the sentencing guidelines is to determine a reasonable sentence after "the particulars of the offense and the offender are considered," as appellant acknowledges (Brief for Appellant at 35). In determining the applicable guideline ranges, the United States Sentencing Commission did not solely look to the seriousness of the offense. Instead, the guidelines take into account a number of other factors including "the deterrent effect a particular sentence may have on the commission of the offense by others" and "the current incidence of the offense in the community and in the Nation as a whole." 28 U.S.C. § 994(c). Moreover, a guideline range is also affected by applicable adjustments and by the offender's criminal history. For example, the guideline range may be decreased "if the defendant clearly demonstrates acceptance of

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[16/] In Halter, the court relied on cases holding that "the Guidelines bind judges and courts." 217 F.3d at 553 (quoting Stinson v. United States, 508 U.S. 36, 42 (1993)).

responsibility for his offense." USSG § 3E1.1. Whether a particular defendant accepts responsibility is relevant to the appropriate sentence - not to the seriousness of the offense that was committed. Similarly, two offenders who commit the same offense may have significantly different guideline ranges based solely on their criminal history category. See USSG Ch. 5, Pt. A (Sentencing Table). Accordingly, the sentencing guidelines are not an appropriate measure of the seriousness of the offense itself.[17/]

[17/] Although appellee submits that the statutory maximum penalties are the proper measure of the seriousness of an offense, if the Court is inclined to look to the sentencing guidelines, under Lloyd, the inquiry should not be limited solely to the applicable guideline range, but to "the *actual* penalty prospectively assessed this defendant." 188 F.3d at 189 n.13. Here, the plea agreement required appellant to continue to cooperate with the government and provided that the government would advise the court of the nature and extent of appellant's cooperation at the time of sentencing and determine whether to file a motion pursuant to section 5K1.1 (A. 20-21). At the sentencing hearing, given appellant's cooperation, the court and the parties acknowledged that the guideline calculation had little bearing on the sentence imposed (7/30/09 Tr. 7-8, 29-30). The government further explained that "at the time of the Plea Agreement Mr. Caso had been cooperating . . . . [The government] forecast at that time that [it] would be -- see no promises were made to Mr. Caso, but [the government] forecast at that time that [it] would be making a 5K Departure Motion" (id. at 29). Given that appellant received a probationary sentence, he would have "gained little or nothing" had the charge been switched to making a false statement because "the punishment would probably have been the same." Lewis, 329 F.3d at 937; cf. Johnson v. Pinchak, 392 F.3d 551, 565 (3d Cir. 2004) (where the defendant was actually innocent of the death penalty, but was exposed to a capital sentencing hearing, the defendant was not entitled to habeas relief because he "was not sentenced to death and is indubitably guilty of the sentence he *actually received*" and "the touchstone of the actual innocence inquiry is the sentence actually *imposed*").

There are also practical impediments to a Guidelines-based approach. First, appellant's suggested approach would mean that a felony offense that results in a sentencing guideline range of 0 to 6 months would be equally as serious as a Class B misdemeanor (30 days to 6 months) and less serious than a Class A misdemeanor (6 months to one year). 18 U.S.C. § 3559(a) (an offense is a Class A misdemeanor if the maximum term of imprisonment authorized is one year or less but more than six months, and an offense is a Class B misdemeanor if the maximum term of imprisonment authorized is six months or less but more than thirty days). Second, there is also a level of uncertainty when it comes to determining the appropriate sentencing guideline range. At the sentencing here, for example, appellant's counsel argued that the court should apply section 2B1.1, rather than section 2C1.1 (7/30/09 Tr. 4).[18/] Finally, depending on which section of the guidelines applied, the calculation of the guideline range could result in an overstatement or understatement of certain aspects of the seriousness of the offense. For example, here appellant failed to disclose at least $17,500 of income that his wife received from Firm A (A. 13-14).

[18/] **Despite arguing before the district court that section 2B1.1 applied to his conviction for conspiracy to commit honest services wire fraud (7/30/09 Tr. 4), appellant now takes the position that, because section 2B1.1 applies to making a false statement, the offense of making a false statement is a less serious offense (Brief for Appellant at 37-39).**

The amount of payments received by appellant's wife could trigger a 4-level enhancement under § 2C1.1(b)(2). However, section 2B1.1 does not provide for any similar enhancements to account for the amount of the payments that are the subject of appellant's false statement.

At a plea hearing, courts are required to inform the defendant of the maximum possible penalties – not the applicable sentencing guideline range. See Fed. R. Crim. P. 11(b)(1)(H). Indeed, many plea agreements, like the plea agreement in this case, inform defendants that "the Sentencing Guidelines are not binding on the Court" and the court may "impose any sentence, up to and including the statutory maximum sentence" (A. 21). The fact that the parties may look to the likely sentencing guideline ranges in determining what plea offer to extend or accept, does not establish that the sentencing guidelines are an appropriate measure of the seriousness of the offense. A number of other factors often influence plea negotiations, including the strength of the government's evidence, available defenses, the potential for cooperation, and the timing of the defendant's guilty plea. Although each of these factors may influence plea bargaining decisions, these factors - like the applicable sentencing guideline ranges - are not an indication of the seriousness of an offense.

Instead, the seriousness of an offense is measured by the congressionally authorized maximum penalties. Here, appellant has failed to demonstrate his innocence of the equally serious offense of making a false statement.

CONCLUSION

WHEREFORE, the United States respectfully requests that the judgment of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a) that this brief contains 8,899 words and that it is filed in Courier New, monospace font.

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electric means through the Court's CM/ECF system, upon counsel for appellant: Elizabeth G. Oyer and Scott M. Novack, Mayer Brown LLP, 1999 K Street NW, Washington, DC 20006, on this 5th day of July, 2012.

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