ORAL ARGUMENT NOT YET SCHEDULED

Case No. 12-3015

In the United States Court of Appeals For the District of Columbia Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

RUSSELL JAMES CASO, JR.,

Appellant.

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 1:07-cr-00332-RCL (Lamberth, C.J.)

BRIEF FOR THE APPELLANT

Elizabeth G. Oyer (#501260)
Scott M. Noveck
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3000

Counsel for Appellant
Russell James Caso, Jr.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. ***Parties.*** The parties to this proceeding are appellant Russell James Caso, Jr. and appellee United States of America. No party is a corporation, joint venture, partnership, syndicate, or similar entity.

2. ***Rulings Under Review.*** This appeal challenges the district court's Memorandum and Order filed on January 12, 2012, by Chief Judge Royce C. Lamberth, which denied appellant Caso's motion to vacate and set aside his judgment and sentence under 28 U.S.C. § 2255. *See* App. 46–59. The order is not published in the Federal Supplement or on Westlaw, and no official citation exists.

3. ***Related Cases.*** Other than the proceedings below and appellant Caso's request for a certificate of appealability, which this Court granted on April 24, 2012, this case has not previously been before this Court or any other court. Counsel is not aware of any other related cases currently pending before any court.

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GLOSSARY

App.	Appendix
COA	Certificate of Appealability (*see* 28 U.S.C. § 2253(c); Habeas Rule 11; Fed. R. App. P. 22(b))
Dist. Ct. Dkt. No.	Refers to district court pleadings as numbered in the district court docket (D.D.C. Case No. 07-332)
PSR	Presentencing Investigation Report

JURISDICTIONAL STATEMENT

The district court had jurisdiction over appellant Caso's motion to vacate and set aside his conviction and sentence under 28 U.S.C. § 2255. The United States has agreed that Caso's motion was timely under 28 U.S.C. § 2255(f)(3)'s one-year statute of limitations because it was filed within one year of the Supreme Court's decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), upon which Caso bases his claim for relief. *See* Opp. to Def.'s Mot. to Vacate and Set Aside Judgment and Sentence 6–8 (Dist. Ct. Dkt. No. 36); *see also* Resp. to Appellant's Req. for a COA 7 ("we have waived any statute-of-limitations defense"); *cf. Wood v. Milyard*, 132 S. Ct. 1826, 1834–35 (2012) (court of appeals is bound by the government's intentional relinquishment of a limitations defense).

The district court denied Caso's Section 2255 motion on January 12, 2012. App. 46–59. Caso moved the following day for a certificate of appealability, which the district court denied on February 24. App. 60–63. Caso timely filed a notice of appeal on March 9, and this Court granted a certificate of appealability on April 24. This Court has jurisdiction under 28 U.S.C. § 2253(a).

STATEMENT OF ISSUES

This Court granted a certificate of appealability as to three issues:[1]

1. In order to overcome procedural default, pursuant to *Bousley v. United States*, 523 U.S. 614 (1998), must a petitioner for habeas relief show actual innocence of forgone charges not presented in the charging document?

2. Is the relative seriousness of offenses, under *Bousley*, properly measured exclusively by statutory maximum sentences, or should the court look to the United States Sentencing Guidelines and other measures in making this determination?

3. In order to overcome procedural default, pursuant to *Bousley*, must a petitioner for habeas relief show actual innocence of charges that are equally serious as, but not more serious than, the charges to which he pleaded guilty?

INTRODUCTION

It is undisputed that appellant Russell James Caso, Jr. is legally and factually innocent of the crime for which he stands convicted. Mr.

[1] We have reversed the order of the second and third issues to reflect the order they are addressed in the argument section.

Caso, a former aide to a United States congressman, pleaded guilty to conspiring to commit honest-services wire fraud (18 U.S.C. §§ 371, 1343, and 1346) by failing to disclose a conflict of interest related to his wife's employment. But as the Supreme Court recently made clear, the honest-services fraud statute does not criminalize the "mere failure to disclose a conflict of interest"; it extends only to "bribes and kickbacks—and nothing more." *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010). Caso was not charged with or convicted of accepting any bribe or kickback.

The district court nevertheless held that Caso's honest-services fraud conviction should stand because he has not proven his innocence of the separate and lesser offense of making a false statement in violation of 18 U.S.C. § 1001—an offense with which he has never been charged. In the district court's view, a habeas petitioner like Caso, whose claim is meritorious but procedurally defaulted, can obtain relief only by showing actual innocence of all offenses—charged or uncharged—that the government claims to have forgone in the course of plea bargaining.

No other court has set such a high procedural barrier to habeas review, and accordingly the district court's holding squarely conflicts with the reasoned decisions of multiple circuit and district courts. Moreover, this standard unreasonably precludes review of meritorious claims. The district court's refusal to entertain Caso's challenge to his undisputedly invalid honest-services fraud conviction subjects Caso to "conviction and punishment * * * for an act the law does not make criminal," which "results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974) (internal quotation marks omitted). Caso's uncontested showing that he is actually innocent of the single offense with which the government charged him should suffice to compel review of his petition on the merits.

STATEMENT OF THE FACTS

Caso's conviction arises out of his work on the staff of a former member of the U.S. House of Representatives ("Representative A"). After he was appointed Representative A's chief of staff in 2005, Caso failed to disclose on a congressional financial disclosure statement that his wife earned income from a non-profit organization ("Firm A") that was lobbying Representative A for support and funding of its policy

proposals. Caso's failure to disclose the conflict of interest created by his wife's relationship with Firm A was the sole basis of his conviction for conspiracy to commit honest-services wire fraud.

A. Factual Background

1. Representative A's support for Firm A

In 2001, Representative A authored a policy proposal that helped to establish Firm A, a non-profit organization whose mission was to aid American businesses operating in Russia and to facilitate the flow of trade between the United States and Russia. App. 12–13. With the assistance and support of Representative A, who continued to serve on its governing council (App. 13), Firm A sought to develop and obtain funding for proposals to further its institutional mission, including a program to facilitate cooperation on joint missile defense activities and a program to reduce the risk of proliferation of biological and chemical weapons from Russia to rogue nations (*id.*). Representative A expressed his longstanding support for Firm A and its mission by sending Firm A's proposals to executive agencies and encouraging the agencies to fund these efforts. *Id.*

Representative A hired Caso as a legislative assistant in 2004. In 2005, he promoted Caso to be his chief of staff, a position Caso held until Representative A lost his bid for reelection in 2006. App. 12. At the direction of Representative A, Caso organized and attended meetings with executive branch agencies in which Representative A and Caso advocated that Firm A's proposals should be federally funded. App. 15; *see also id.* (noting that Caso arranged these meetings "at Representative A's direction"). Despite Representative A's encouragement, Firm A's efforts to win funding for its proposals were ultimately unsuccessful. App. 13.

2. Mrs. Caso's work for Firm A

In April 2005, Firm A hired Caso's wife, an English teacher with prior proposal-writing experience, to edit English translations of the Firm's proposals. Firm A paid Mrs. Caso $4,000 during April and May 2005 for her editing work. App. 13–14.

Firm A asked Mrs. Caso to perform additional work during the summer of 2005. This work was expected to include, among other things, opening and staffing the Firm's Washington, D.C. office and designing its website. App. 14. Mrs. Caso agreed, but little work

ultimately materialized during the summer months because Firm A failed to receive the expected funding for its programs. *Id.* Although Firm A's general secretary told Mrs. Caso that he expected her to be "swamped" with work once the Firm's proposals received funding, Mrs. Caso never became "swamped." Firm A paid her $15,000 between June and August 2005, though demands did not call for Mrs. Caso to perform the amount of work anticipated. App. 13–14. When Firm A "later attempted to recruit [Mrs. Caso] to play what [it] described as a large role in Firm A's business," Mrs. Caso declined. App. 14.

3. The criminal proceeding against Mr. Caso

As an aide to Representative A, Caso was required to submit annual financial disclosure statements listing all sources of earned income from which he received $200 or more, or from which his wife received $1,000 or more. App. 14. Caso's disclosure statement for the calendar year 2005 did not list the income his wife earned through her work for Firm A. App. 14–15.

In December 2007, the government filed a single-count information charging Caso with conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. §§ 371, 1343, and 1346. App. 7–11.

Days later, Caso accepted a plea agreement and pledged his full cooperation in the government's ongoing investigation of Representative A and others. App. 18–25. As part of that plea, he agreed to a series of factual stipulations prepared by the government. App. 12–17; *see also* App. 19.

The sole basis for the charge and conviction was Caso's failure to disclose the conflict of interest created by his wife's receipt of income from Firm A. According to the facts stipulated in the Statement of Offense, "On the Disclosure Statement covering calendar year 2005, CASO intentionally failed to disclose that his wife received payments from Firm A * * * even though he knew that he was required to do so. A reason for this non-disclosure was that [Caso] knew that his wife's financial relationship with Firm A created a personal conflict of interest." App. 14–15. On this basis, the government's Proposed Elements of the Offense charged that Caso "deprive[d] another of the intangible right of honest services" by "fail[ing] to disclose a conflict of interest that resulted in personal gain." App. 27.

Although Caso's plea was entered on December 7, 2007, sentencing was deferred until August 13, 2009, so that his sentence

could fully reflect his extensive cooperation with the government's ongoing criminal investigation. At sentencing, the government summarized Caso's cooperation as "truly extraordinary in timeliness, substance, and volume" and urged that "his sentence should reflect this fact." App. 39. It is Caso's understanding that the government also filed a sealed, *ex parte* memorandum describing in detail the nature and extent of his cooperation. *See* App. 29–30, 38, 40 (referencing this filing).

Caso was sentenced to a 170-day term of home confinement and three years of probation and was ordered to pay a $100 special assessment. Caso has now completed his term of home confinement. His term of probation is scheduled to end August 14, 2012.

The collateral consequences of his conviction continue to weigh heavily on Caso and his family.[2] Caso's plea was the subject of widespread media attention. Days later, he lost his job. The family now bears over $100,000 in debt, attributable largely to Caso's legal fees and to the medical bills of his young son, who suffers from cerebral

[2] Due to the collateral consequences of a criminal conviction, the expiration of Caso's probation will not moot this appeal. *See*, *e.g.*, *United States v. Maddox*, 48 F.3d 555, 560 (D.C. Cir. 1995).

palsy. Caso is currently self-employed as a consultant. His felony conviction has made it impossible for him to secure stable, full-time employment outside the home. For purposes of this proceeding, Caso has been able to retain counsel to represent him on a *pro bono* basis.

B. Post-Conviction Proceedings in the District Court

Following the Supreme Court's decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), Caso moved the district court to vacate and set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. The government did not dispute that the facts supporting Caso's guilty plea are incapable of sustaining a conviction for honest-services fraud under *Sklling*. But the government nevertheless opposed Caso's motion to vacate his conviction and sentence, arguing that his claim was procedurally defaulted because he did not raise it on direct appeal. The government's position was that to overcome the procedural default, Caso was required to show not only that he is actually innocent of honest-services fraud, for which he was convicted, but also that he is innocent of any other offense that the government ***could have*** charged but elected not to.

The district court agreed with the government, acknowledging that Caso is actually innocent of honest-services fraud but holding that his claim is procedurally barred nonetheless. App. 46–59. The court noted that "[t]he defendant and the government both agree that [Caso] is actually innocent of the crime of honest services wire fraud as defined post-*Skilling*, since the admitted-to conduct did not include a bribe or kickback." App. 51. But it held that Caso could not make the showing required by *Bousley v. United States*, 523 U.S. 614 (1998), to overcome his procedural default. As the district court read *Bousley*, Caso was required to show not only that he is innocent of the crime of honest-services fraud, but also that he is innocent of the ***uncharged*** offense of making a false statement under 18 U.S.C. § 1001, which he failed to do. App. 51–59. As a result, the court declined to hear the merits of Caso's habeas petition.

Caso moved the district court for a certificate of appealability, which the court denied on the mistaken belief that a COA cannot issue when a habeas petition is denied on procedural rather than constitutional grounds. *See* App. 60–63. Caso subsequently sought a COA from this Court, and the government agreed that the COA should

issue (Resp. to Appellant's Req. for a COA 5–8). This Court granted the COA on April 24, 2012.

SUMMARY OF THE ARGUMENT

The district court in this case misapplied the standard for granting habeas review of a claim that was not raised on direct appeal and is therefore procedurally defaulted. In *Bousley v. United States*, the Supreme Court reaffirmed that a habeas petitioner may overcome a procedural default by showing that he is "actually innocent" of the offense for which he was convicted. 523 U.S. 614, 622, 623 (1998) (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986)). *Bousley* then added 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 extend to those charges." *Id.* at 624.

There is no dispute that Caso is actually innocent of the charged conspiracy to commit honest-services wire fraud. Nevertheless, the district court concluded that Caso's honest-services fraud conviction should stand because the government purportedly could have charged Caso instead with the different offense of making a false statement in violation of 18 U.S.C. § 1001. The district court held that *Bousley*

required Caso to prove his innocence of this hypothetical false-statement offense, even though no such offense was ever charged and even though a false statement is a less serious offense than the honest-services fraud conspiracy for which Caso stands convicted. Because Caso did not make such a showing, the court found that his claim was procedurally defaulted.

The district court's refusal to consider the merits of Caso's petition rests on three separate errors of law, and conflicts with decisions of other courts on each issue.

First, the district court erroneously held that the required showing of actual innocence extends not only to offenses that were charged and subsequently dismissed, but also to offenses that were ***never charged***. This is contrary to *Bousley*'s holding and to all authority applying it. Moreover, this approach is unworkable and unfair. It would turn the simple threshold question of the scope of the actual innocence requirement into a complex question of the government's subjective intentions at the time of the plea, needlessly consuming substantial resources of the court and the parties with a collateral matter. And it would invite the government to make a one-

sided showing, as it did here, based on post hoc evidence, of its supposed intentions to bring another charge. In contrast, limiting the inquiry to the charging document—as other courts have done—defines clear and objective boundaries for the actual innocence showing. It is readily ascertainable from the charging document which if any charges may have been forgone, without the need for subjective analysis or competing evidentiary presentations.

Second, the court erroneously refused to consider the Sentencing Guidelines in calculating the relative seriousness of offenses under *Bousley*, holding instead that the statutory maximum penalties were dispositive. Under the Guidelines, a false statement is a decidedly less serious offense than conspiracy to commit honest services fraud, and therefore not subject to *Bousley*'s requirement that the petitioner show actual innocence of "more serious" offenses forgone in plea bargaining. And as other courts have held, the Guidelines are the proper point of reference under *Bousley* because they reflect the ***actual punishment*** that an offense is likely to yield. Accordingly, the Guidelines—not statutory maximums—play the predominant role in plea negotiations. Moreover, under the district court's calculus, all conspiracies charged

under Section 371 would be treated as equally serious, regardless of their object. No reasonable court or prosecutor would treat, for example, a conspiracy to make a false statement as equally serious to a conspiracy to commit murder or an act of terrorism, notwithstanding that they carry the same statutory maximum sentence.

Third, the district court erroneously held that *Bousley*'s requirement that a defendant prove his innocence of "***more serious***" charges also extends to charges that are only "equally serious." *Bousley* expressly limits the required showing of actual innocence to more serious offenses, and its logic does not support extending this requirement to equally serious or less serious crimes.

STANDARD OF REVIEW

This Court reviews a district court's denial of post-conviction relief under 28 U.S.C. § 2255 *de novo*. *See*, *e.g.*, *United States v. Palmer*, 296 F.3d 1135, 1141 (D.C. Cir. 2002).

ARGUMENT

As the Supreme Court held in *Bousley v. United States*, a procedural default is overcome if the habeas petitioner "can establish that [an] error in the plea colloquy 'has probably resulted in the

conviction of one who is actually innocent.'" 523 U.S. 614, 623 (1998) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). If the "guilty plea was unintelligent because the District Court * * * misinformed [the defendant] as to the elements of [the] offense," the plea must be deemed "constitutionally invalid." *Id.* at 618–19. That is precisely the situation here, as "the record reveals that neither [Caso], nor his counsel, nor the court correctly understood the essential elements of the crime with which [Caso] was charged." *Cf. id.* at 618. Indeed, if the sentencing court had correctly understood that honest-services fraud requires a defendant to have accepted a bribe or kickback—something Caso is not alleged to have done—then it would have been required to reject the plea. *See* Fed. R. Crim. P. 11(b)(3). Caso's failure to demonstrate his actual innocence of the separate and uncharged offense of making a false statement is no obstacle to habeas review of his undisputedly invalid honest-services fraud conviction.

I. CASO IS NOT REQUIRED TO PROVE HIS INNOCENCE OF AN OFFENSE THAT WAS NEVER CHARGED.

Bousley articulated a limited exception to the general rule that a showing of actual innocence on the charge of conviction suffices to overcome procedural default: "In cases where the Government has

forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." 523 U.S. at 624. This proviso simply reflects the practical reality that prosecutors sometimes agree to drop more serious charges in exchange for a certainty of conviction on a lesser charge. It does not burden a habeas petitioner with demonstrating that he is innocent of all other conceivable offenses that the government claims it could have charged but elected not to. Indeed, such a requirement is not only impractical and unfair, but also inconsistent with *Bousley*'s holding and with all authority applying it.

A. *Bousley* Itself Limits The Required Showing Of Actual Innocence To Offenses In The Charging Document.

Bousley itself rejected the argument that the petitioner could be required to show actual innocence of an offense not charged in the indictment in order to overcome procedural default. The petitioner in *Bousley* pleaded guilty to the offense of "using" a firearm in connection with a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1). 523 U.S. at 616–17. As in this case, he sought collateral relief after a subsequent Supreme Court decision limited the reach of that statute. *Id.* at 616. The Court held that although Bousley had procedurally

defaulted his claim, he could overcome the default by showing his actual innocence of the offense of conviction. *Id.* at 623–24.

In reaching this holding, the Court expressly rejected the government's argument that the petitioner was ***also*** required to demonstrate actual innocence of the uncharged offense of "carrying" a firearm in connection with the crime. *Id.* at 624. The Court explained that Bousley was not required to show "that he is actually innocent of both 'using' and 'carrying' a firearm," because "***[the] indictment charged him only with 'using' firearms***." *Id.* (emphasis added). The Court also observed that there was "no record evidence that the Government elected not to charge petitioner with 'carrying' a firearm in exchange for his plea of guilty." *Id.* Under these circumstances, the petitioner was required to "demonstrate no more than that he did not" commit the single charged offense. *Id.*

Under *Bousley*'s terms, Caso cannot be required to show actual innocence of a false statement offense that was not charged in the information. *Bousley* allows for the possibility that other "record evidence" could show that a charge was forgone, but in *Bousley*—as in

this case and most other cases—the charging document is the only record evidence memorializing the charging decision.

The district court accepted as "record evidence" a prosecutor's post hoc declaration that the government elected not to charge a false statement in exchange for Caso's guilty plea. *See* App. 54. But *Bousley*'s allowance for "record evidence" plainly extends only to evidence in the ***existing*** record—*i.e.*, the record as it existed at the time of the plea. *Bousley* did not contemplate allowing the government to create new evidence, years after the plea was entered, to prove that it could or would have brought other charges.[3]

Indeed, the Court in *Bousley* did not allow the government an opportunity to supplement the record with evidence substantiating its contention that it could have or would have charged a different offense. Instead, the Court remanded for an evidentiary hearing limited to the central question of whether the petitioner was actually innocent of the

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[3] We submit that the better rule is to limit the inquiry strictly to the charging document, for the reasons set forth in Part I.C, *infra*. But if the Court is inclined to give content to *Bousley*'s undefined reference to "record evidence," we submit that such evidence of forgone offenses could include, for example, language in the plea agreement listing offenses that would not be charged, or statements made on the record when entering the plea which memorialize the parties' negotiations.

charged offense. The Court stated that "the Government is not limited to the existing record ***to rebut any showing [of actual innocence]*** that petitioner might make." 523 U.S. at 624 (emphasis added). But this allowance for extra-record evidence plainly extended ***only*** to the central question of guilt or innocence. The Court did not contemplate or permit an evidentiary hearing on the collateral question of what charges may have been forgone during plea bargaining.

Here, as in *Bousley*, the charging document does not charge Caso with making a false statement. Nor has the government identified any other evidence in the contemporaneous record that it elected not to charge a false statement charge in exchange for Caso's plea. Because the government concedes that Caso is actually innocent of the single charged offense of honest-services fraud, Caso has made the only showing necessary to overcome the procedural default of his claim. The government's post hoc assertion that it could have charged Caso with a false statement, but chose not to, is not a valid ground for refusing to entertain the merits of his petition.

B. No Court Has Ever Extended *Bousley* To Uncharged Offenses.

Consistent with its holding, courts have uniformly understood *Bousley* to require a showing of actual innocence only of those charges ***in the indictment*** that were subsequently dismissed in the course of plea bargaining.[4] We have not found any case—and the government

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[4] *See*, *e.g.*, *Vanwinkle v. United States*, 645 F.3d 365, 369–70 (6th Cir. 2011) (denying relief where petitioner failed to show actual innocence of "the more serious charges in the indictment"); *United States v. Lee*, 163 F. App'x 741, 743 (10th Cir. 2006) (requiring petitioner to "prove actual innocence of the three drug counts for which he was indicted"); *United States v. Montano*, 398 F.3d 1276, 1285 (11th Cir. 2005) (requiring petitioner to show actual innocence of the "three other counts of the indictment"); *Johnson v. Pinchak*, 392 F.3d 551, 564–65 (3d Cir. 2004) (requiring petitioner to show actual innocence of charge that "the prosecution dismissed in exchange for his guilty plea"); *Lewis v. Peterson*, 329 F.3d 934, 935 (7th Cir. 2003) (requiring showing of actual innocence of a charge brought in a separate indictment); *Lyons v. Lee*, 316 F.3d 528, 533 n.5 (4th Cir. 2003) (requiring petitioner to show actual innocence of lesser charge to which he pleaded, as well as "the original charge of armed robbery"); *Peveler v. United States*, 269 F.3d 693, 700 (6th Cir. 2001) (requiring petitioner to show actual innocence of "counts in the original indictment"); *Dejan v. United States*, 208 F.3d 682, 687 (8th Cir. 2000) (requiring petitioner to show actual innocence of "the charged but dismissed drug offense"); *United States v. Garth*, 188 F.3d 99, 107 (3d Cir. 1999) (requiring defendant to show actual innocence of "any other more serious charges that were dropped pursuant to the plea agreement"); *United States v. Lloyd*, 188 F.3d 184, 189 (3d Cir. 1999) (requiring petitioner to show actual innocence of "dismissed" counts); *Luster v. United States*, 168 F.3d 913, 915 (6th Cir. 1999) (petitioner must show actual innocence of "the more serious crimes in the indictment foregone by the government"); *United*

has not cited one—that extends the required showing of actual innocence to ***uncharged*** offenses.

As far as we have seen, every court that has considered whether *Bousley* can be extended to uncharged offenses has held that it cannot. For example, in *United States v. Duarte-Rosas*, the Ninth Circuit held that the district court "erred by requiring [the petitioner] to show actual innocence of other charges the government could have brought. Requiring [the petitioner] 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 F. App'x 521, 522 (9th Cir. 2007) (citing *United States v. Benboe*, 157 F.3d 1181, 1184 (9th Cir. 1998)).[5]

States v. Apker, 174 F.3d 934, 939 (8th Cir. 1999) (denying relief where petitioner could not "demonstrate actual innocence of the drug trafficking charges that were alleged in the superseding indictment and dismissed in exchange for [his] guilty plea"); *Hampton v. United States*, 191 F.3d 695, 703 (6th Cir. 1999) (petitioner must show "actual innocence on the forgone counts of the indictment"); *United States v. Powell*, 159 F.3d 500, 502-03 (10th Cir. 1998) (requiring showing of actual innocence of charges in indictment); *United States v. Benboe*, 157 F.3d 1181, 1184 (9th Cir. 1998) (requiring showing of actual innocence of "any more serious charges dismissed pursuant to the plea agreement").

[5] The district court below sought to distinguish *Duarte-Rosas* by stating that it would not require Caso to show actual innocence of "all

Post-*Skilling*, at least two district courts have similarly rejected the government's contention that the required showing of actual innocence extends to uncharged conduct. In *United States v. Lynch*, two petitioners collaterally attacked their respective convictions for the same offense of which Caso was convicted, conspiracy to commit honest-services fraud in violation of 18 U.S.C. § 371. 807 F. Supp. 2d 224, 227 (E.D. Pa. 2011). Like Caso, each petitioner had been charged in a one-count information with an undisclosed-conflict-of-interest theory of honest-services fraud. The government argued that, to overcome the procedural default of their claims, the petitioners were required to prove their actual innocence of both the charged theory of honest-services fraud ***and*** the bribery/kickback variety of honest-services fraud that remains valid after *Skilling*. The court expressly "reject[ed] the Government's argument that defendants must prove their actual

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possible crimes," but "instead, he must only show actual innocence if record evidence establishes that the government dropped those potential charges during plea negotiations." App. 54 n.1. As we have explained, however, a post hoc affidavit does not constitute "record evidence" within the meaning of *Bousley*. *See* pp. 18–20, *supra*. Moreover, there is no reliable or efficient way for a court to ascertain whether an offense not charged in an indictment or information was in fact abandoned in exchange for the defendant's guilty plea. *See* pp. 24–27, *infra*.

innocence of any viable theory of honest services fraud regardless of whether charged." *Id.* at 231 (citing *Bousley* and *Duarte-Rosas*). "Because defendants cannot be required to demonstrate their actual innocence of a crime that was never charged," the court proceeded to address the merits of petitioners' claims (*id.* at 233), and granted collateral relief (*id.* at 235). Likewise, in *United States v. Panarella*, the district court held post-*Skilling* that where "the superseding information to which [the petitioner] pled guilty only charged an undisclosed self-dealing theory in violation of § 1346," the petitioner "has established fundamental error and need not prove 'actual innocence' with respect to uncharged crimes." No. 2:00-cr-655, 2011 WL 3273599, at *8 (E.D. Pa. Aug. 1, 2011). No court has held to the contrary.

C. Extending *Bousley* To Uncharged Offenses Is Unworkable And Would Invite Abuse.

Limiting the required showing of actual innocence to offenses in the charging document—as *Bousley* and every court to apply it have done—serves the interests of efficiency, judicial economy, and fairness to the petitioner. The charging document typically is the only record evidence—and the only objective evidence—of which if any charges were

"forgone * * * in the course of plea bargaining." *Bousley*, 523 U.S. at 624. It therefore defines clear and objective parameters for the actual-innocence showing. From the charging document, the universe of potentially forgone charges is clearly defined and readily ascertainable. Under the district court's approach, in contrast, the universe is limitless, bounded only by the scope of the U.S. Code and the creativity of the prosecutors. To allow the government to go outside the charging document—as the district court did here—turns a simple threshold question about the scope of the actual-innocence requirement into a needlessly complex and subjective assessment of the government's intentions at the time of plea negotiations.

That approach would consume substantial time and resources of the court and the parties with a purely collateral matter. An evidentiary hearing would be required whenever a party seeks to present evidence outside the existing record. Here, for example, the government asked the district court to hold "an evidentiary hearing at which the United States will present additional evidence regarding the False Statement charge the Government forewent." Opp. to Def.'s Mot. to Vacate and Set Aside Judgment and Sentence 2 (Dist. Ct. Dkt. No.

36). And in contested cases, this initial hearing on the preliminary question of what charges were forgone would be followed by a second evidentiary hearing on the core question of the petitioner's actual innocence. *Bousley* expressly contemplated only the latter of these two hearings.

Here, the district court avoided the necessity of conducting an initial evidentiary hearing by accepting a proffer from the government—in the form of a prosecutor's affidavit—that it forwent a false statement charge in exchange for Caso's guilty plea. *See id.* at 21–22 & Ex. 2 (outlining prosecutor's proffered testimony); App. 54–55. The court did not offer Caso an opportunity to refute or test the credibility of the proffered evidence.

The district court's acceptance of evidence from one side only is plainly inconsistent with constitutional due process principles. But moreover, it illustrates the futility of meaningfully rebutting a prosecutor's sworn affidavit about what was in his mind at the time of plea bargaining. The government can always point to new or additional charges that its prosecutors could have or would have pursued but for the plea agreement. There is little that a habeas petitioner can do—

often years after the fact—to refute such a claim by an officer of the court.

The simplest and fairest rule, and the one supported by the case law, is that the required showing of actual innocence extends only to forgone charges in an indictment or information. If the Court is inclined to adopt a broader rule, it could entertain other portions of the contemporaneous record, such as an express statement in the plea agreement, as evidence that particular charges were forgone. But to allow the government to go outside the existing record and present new evidence of its intentions at the time of plea bargaining would be inconsistent with principles of due process and judicial economy and at odds with the holding in *Bousley*.

D. Sustaining Caso's Invalid Conviction Based On The Claim That He Could Have Been Prosecuted For A Different, Uncharged Offense Would Violate Due Process.

To sustain Caso's undisputedly invalid honest-services fraud conviction unless he can prove himself innocent of the separate, uncharged offense of making a false statement would also violate constitutional due process principles.

To begin with, such a holding would contravene the "ancient doctrine of both the common law and of our Constitution" that "a defendant cannot be held to answer a charge not contained in the indictment brought against him." *Schmuck v. United States*, 489 U.S. 705, 717–18 (1989). This storied principle is embodied in Caso's Fifth Amendment right not to "be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V; *see also* Fed. R. Crim. P. 7 (requiring charging by indictment or information).

Requiring Caso to prove his innocence of an uncharged false-statement offense would also impermissibly invert the rule that "the prosecution bears the burden of proving all elements of the offense charged." *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993). This "beyond-a-reasonable doubt requirement, which was adhered to by virtually all common-law jurisdictions" at the time of ratification (*id.* at 278), applies to all criminal proceedings as a matter of constitutional due process. *See*, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000); *In re Winship*, 397 U.S. 358, 364 (1970).

Finally, any refusal to vacate Caso's invalid conviction and sentence for honest-services fraud would violate due process principles that forbid "conviction and punishment * * * for an act that the law does not make criminal." *Davis v. United States*, 417 U.S. 333, 346 (1974). "There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346–47 (alteration omitted). *Bousley*'s judicial gloss on Section 2255, requiring defendants to demonstrate actual innocence of more serious charges forgone during plea bargaining, is at most a very narrow exception to this constitutional principle and should be extended no further than what *Bousley* itself requires.

II. *BOUSLEY* DOES NOT REQUIRE CASO TO SHOW ACTUAL INNOCENCE OF MAKING A FALSE STATEMENT UNDER 18 U.S.C. § 1001 BECAUSE IT IS A LESS SERIOUS OFFENSE THAN HONEST-SERVICES WIRE FRAUD.

Caso is not required to demonstrate actual innocence of making a false statement for the separate reason that it is a less serious offense than the honest-services-fraud conspiracy to which he pleaded guilty. *Bousley* requires a petitioner to establish actual innocence of offenses other than the offense of conviction only "where the Government has

forgone ***more serious charges*** in the course of plea bargaining." 523 U.S. at 624 (emphasis added). No such showing is required for offenses that are ***less serious*** than the offense of conviction. Under the Sentencing Guidelines, Caso's honest-services fraud offense carried a range of imprisonment of 18 to 24 months, compared to 0 to 6 months for a false statement charge. Accordingly, the latter is a less serious offense that falls outside the scope of the required actual innocence showing.

The district court did not dispute that *Bousley* does not require Caso to show actual innocence of a less serious offense, or that the charged honest-services conspiracy carries a greater Guidelines sentence than the uncharged false statement. Nonetheless, the court determined that the two offenses are "equally serious"—and therefore, it held, within the scope of *Bousley*—because they carry the same statutory maximum penalty.[6] App. 59. Rejecting the reasoned holdings of two circuit courts, the district court held that the seriousness of an offense is dictated by its statutory maximum sentence, without

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[6] Whether an offense that is "equally serious" as but not "more serious" than the offense of conviction falls within the showing required by *Bousley* is addressed in Part III, *infra*. In our view, it does not.

reference to the Sentencing Guidelines. App. 57–59. This is wrong for multiple reasons.

1. The Sentencing Guidelines Supply The Proper Measure Of The Seriousness Of An Offense.

As at least two circuits have recognized, the Sentencing Guidelines are an indicator of actual punishment associated with an offense, and therefore they supply a better measure of relative seriousness than statutory maximum sentences. For this reason, both the Third and Eighth Circuits have looked to the Sentencing Guidelines to compare the seriousness of offenses when applying *Bousley*. In *United States v. Lloyd*, the Third Circuit held that the comparison must be made "in accordance with the refining criteria of the United States Sentencing Guidelines and [as] set forth in the government's Presentencing Report." 188 F.3d 184, 189 n.13 (3d Cir. 1999); *see also id.* at 185 n.1, 189 (discussing the guidelines range as set forth in the PSR). In so holding, the Third Circuit "reject[ed] as improper the comparison urged by the government of the general *maximum allowable* penalty" for the forgone offense to that for the offense of conviction—the very position that the government urges here. *Id.* at 189 n.13. The Eighth Circuit likewise rejected the use of statutory

maximums in *United States v. Halter*, holding instead that "actual punishment as determined by the Guidelines is the proper basis for identifying the 'more serious charge.'" 217 F.3d 551, 553 (8th Cir. 2000). Agreeing with the Third Circuit's reasoning in *Lloyd*, the Eighth Circuit explained that "[i]t is not sensible * * * to apply an abstract statutory maximum punishment when the application of the Guidelines to the same conduct leads to a period of imprisonment much shorter than the five-year mandatory sentence." *Id.* Accordingly, "the actual punishment, as opposed to the statutory maximum, is the relevant factor in comparing the seriousness of the charges." *Id.*

In this case, the district court refused to follow *Lloyd* and *Halter* because they were decided prior to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory but not mandatory. *See* App. 57. In the district court's view, the sole factor that a court may consider when comparing the seriousness of two offenses after *Booker* is the statutory maximum sentence for each offense. App. 57–59. There are multiple problems with this reasoning.

First, the district court's exclusive focus on statutory maximums ignores the fact that *Bousley* was concerned with the practical realities of plea bargaining. Prosecutors and defendants do not base their plea-bargaining decisions on theoretical maximums; they look to the practical factors that best predict the anticipated sentence—including, most significantly, the Guidelines range. Indeed, the plea agreement that the government offered Caso specifically advised him that the court's sentence would "includ[e] a consideration of the guidelines and policies promulgated by the United States Sentencing Commission, *Guidelines Manual*" (App. 19), and the agreement stipulated a number of facts to be considered in the court's Guidelines calculation (App. 19–20).

This approach is consistent with the U.S. Attorneys' Manual, which governs charging decisions in cases such as this one. The Manual expressly instructs prosecutors to evaluate the relative seriousness of offenses in terms of their Guidelines ranges. The Manual directs prosecutors to charge "the most serious offense" consistent with the defendant's conduct and likely to result in a sustainable conviction. U.S. Attorneys' Manual § 9-27.300, *available at* http://www.justice.gov/

usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.300. It further provides that "[t]he 'most serious' offense is generally that which yields the highest range under the sentencing guidelines." *Id.* Notably, the Manual does ***not*** refer prosecutors to statutory maximum sentences in comparing the relative seriousness of offenses.

Post-*Booker*, courts have continued to employ the Guidelines as the measure of relative seriousness. For example, the court in *Castillo v. United States* recently rejected the government's proposed "statutory maximum approach" in favor of the Guidelines-based approach, "[f]ollowing the majority of circuits which have decided this issue." No. 1:09-cv-04222-ENV, 2011 WL 4592829, at *4 (E.D.N.Y. Sept. 30, 2011). *Castillo* endorsed the reasoning of the Eighth Circuit in *Halter* and the Third Circuit in *Lloyd*. *See id.* Similarly, in *Short v. United States*, the court held that "[t]he advisory guidelines range" was "the relevant factor in comparing the seriousness of the charges." No. 4:09-cv-00763-CAS, 2010 WL 682311, at *4 (E.D. Mo. Feb. 23, 2010) (holding that showing of actual innocence was not required where "the advisory guidelines range is equivalent" for the two offenses) (quoting *Halter*, 217 F.3d at 552).

The district court in this case reasoned that statutory maximums reflect congressional determinations about the "levels of retribution" that the offenses in question "may warrant." App. 58–59. But as every other court to consider the issue has recognized, the Guidelines reduce the theoretical statutory penalties that an offense "may warrant" in the abstract into a measure of ***actual*** punishment that reflects the amount of retribution actually warranted once the particulars of the offense and the offender are considered. This approach is also more consistent with *Bousley*, which sought to account for the actual decisions parties make during plea bargaining and whether provable charges were forgone as a result. The district court's refusal to look to the Sentencing Guidelines is contrary to *Bousley* and all authority applying it.

Second, the district court was incorrect to suppose that the Sentencing Guidelines do not impose any limits on a court's sentencing discretion after *Booker*. To the contrary, *Booker* was clear that courts are still "require[d] * * * to consider Guidelines ranges." 543 U.S. at 245. Indeed, a subsequent Supreme Court decision directs that "the Guidelines should be the starting point and the initial benchmark" in every case. *Gall v. United States*, 552 U.S. 38, 49 (2007). When the

sentencing court wishes to impose a sentence outside the Guidelines range, it "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50. Even then, a non-Guidelines sentence will be rejected unless the sentence is "reasonable" under the factors set forth in 18 U.S.C. § 3553(a). *See Booker*, 543 U.S. at 260–65. And, in turn, the factors a court must consider in assessing the reasonableness of a sentence under Section 3553(a) include the applicable Guidelines range and any policy statements issued by the Sentencing Commission. *See* 18 U.S.C. §§ 3553(a)(4)(A), (a)(5). Just as it is reversible error for a district court to refuse to calculate and consider the Guidelines range in sentencing (*see Gall*, 552 U.S. at 51), so too was it reversible error in this case for the district court to base its comparison of the two offenses at issue solely on their statutory maximum sentences, without considering the Guidelines.

Third, the district court's approach would yield plainly illogical results. The district court's conclusion that a false statement is equally serious as the conspiracy offense of which Caso was convicted rests on the fact that false statement offenses under Section 1001 and

conspiracy offenses under Section 371 both carry a five-year statutory maximum penalty. *See* App. 59. If that reasoning were correct, it would mean that the object of the conspiracy has no bearing on the seriousness of the offense. An offense of conspiracy against the United States under Section 371 predicated on honest-services fraud would be deemed equally serious as the same conspiracy offense predicated on murder or terrorism.

No reasonable prosecutor or defendant would expect these charges to produce equal sentences or weigh them the same when plea bargaining. That is because the parties' expectations when plea bargaining are anchored to the Sentencing Guidelines, which have rejected that approach. Accordingly, the district court's single-minded focus on statutory maximums—refusing to look to the Guidelines or other measures of actual punishment—is inconsistent with the practical concerns that underlie *Bousley* and should be rejected.

2. Under The Guidelines, A False Statement Is A Less Serious Offense Than Honest-Services Fraud.

The Sentencing Guidelines direct courts to calculate the punishment for conspiracy by reference to the underlying substantive offense. *See* USSG § 2X1.1(a). Accordingly, Caso's offense level here

was determined by application of USSG § 2C1.1, which yielded a base offense level of 14 and an adjusted offense level of 15. The resultant sentencing range was 18 to 24 months imprisonment.[7] By contrast, if Caso had been charged with a false statement (or conspiring to make a false statement), his offense level would have been determined under USSG § 2B1.1, which yields a base offense level of 6 and an adjusted offense level of 4. The sentencing range would be zero to six months imprisonment.[8] Thus, whether charged as conspiracy or as a

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[7] The sentencing court determined that the total offense level for the honest-services fraud conspiracy to which Caso pled guilty was 15. *See* Statement of Reasons (Dist. Ct. Dkt. No. 24); Presentence Investigation Report ("PSR") at 8–9. The base offense level under Section 2C1.1, which the Court determined to be the applicable Guideline, was 14. *See* USSG § 2C1.1(a)(1). The Court applied a 4-level enhancement under Section 2C.1.1(b)(2), reflecting the value of the payments received by Caso's wife. The adjusted offense level was thus determined to be 18. *See* PSR at 9. The Court then applied a 3-level reduction for acceptance of responsibility (*see* USSG § 3E.1.1(a)), reducing the total offense level to 15. In light of Caso's criminal history (Category I), this was a Zone D offense, with a range of imprisonment of 18 to 24 months. *See* Statement of Reasons, *supra*; USSG ch. 5, pt. A (Sentencing Table). The government recommended and Caso received a lower sentence based on his extensive cooperation in a government investigation.

[8] A false statement in violation of 18 U.S.C. § 1001 has a base offense level of 6. *See* USSG § 2B1.1(a)(2). Because none of the enhancements available under Section 2B1.1(b) would apply to the offense described by the government, the adjusted offense level would also be 6. Caso would presumably receive a 2-level reduction for

substantive offense, honest-services wire fraud is more serious and carries a greater expected punishment than a false statement.[9]

3. Even Looking To Statutory Maximum Sentences, A False Statement Is Less Serious Than Honest-Services Fraud.

Even looking exclusively to the applicable statutory maximum sentences, the district court was incorrect that honest-services fraud is no more serious than a false-statement. The district court's comparison was based on the maximum sentence allowed by the conspiracy statute under which Caso was charged, 18 U.S.C. § 371 (*see* App. 59). But, as noted above, this superficial comparison would equate all conspiracy offenses. If statutory maximum sentences are controlling, then the court should look to the statutory sentence for the ***object offense***. It is this maximum sentence—not the maximum sentence for conspiracy in

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acceptance of responsibility pursuant to Section 3E1.1(a). Accordingly, the total offense level would be 4. This would be a Zone A offense, with a range of imprisonment of 0 to 6 months. *See* USSG ch. 5, pt. A (Sentencing Table).

[9] Statutory maximum sentences would play a role only if the Guidelines yielded a sentence greater than the allowable statutory penalty. Because the Guidelines sentence for each offense at issue here is well below the five-year statutory maximum, statutory maximums play no role in calculating the applicable penalties.

general—that reflects Congress's judgment about the severity of the particular offense.[10]

Here, while the substantive offense of making a false statement carries a five-year statutory maximum, the substantive offense of mail or wire fraud carries a maximum sentence of ***twenty years***. *See* 18 U.S.C. § 1343.[11] Accordingly, even the instructive statutory maximums sentences indicate that Congress views a false statement under 18 U.S.C. § 1001 as a less serious offense than honest-services wire fraud.

* * *

Because the offense of false statement under 18 U.S.C. § 1001 is less serious than honest-services wire fraud, Caso is not required to prove that he is actually innocent of that offense. And the government does not dispute that Caso is actually innocent of the honest-services fraud offense. Accordingly, Caso "need demonstrate no more" (*Bousley*, 523 U.S. at 624) for a court to entertain the merits of his petition.

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[10] It is for precisely this reason that the Guidelines direct the sentencing court to the base offense level "for the substantive offense" in calculating the base offense level for conspiracy. *See* USSG § 2X1.1(a).

[11] In addition, the same conspiracy to commit honest-services wire fraud, if charged under 18 U.S.C. § 1349 (which relates specifically to conspiracy to commit a mail or wire fraud offense), would carry a maximum sentence of twenty years. *See* 18 U.S.C. § 1343.

III. *BOUSLEY* DOES NOT REQUIRE CASO TO PROVE ACTUAL INNOCENCE OF AN OFFENSE THAT IS ONLY "EQUALLY SERIOUS AS" THE OFFENSE OF CONVICTION.

Even if the district court were correct that a false statement is "equally serious as" honest-services fraud, Caso would not be required under *Bousley* to prove his innocence of that offense. *Bousley* expressly provides that the required showing of actual innocence extends only to "more serious charges" foregone in the course of plea bargaining. 523 U.S. at 624. Notwithstanding this unambiguous language, a circuit split has emerged over this issue, with one circuit adhering to *Bousley*'s plain language and another extending it to encompass "equally serious" charges. We submit that this Court should follow the Third Circuit in hewing to the language of *Bousley* and reject the more expansive application endorsed by the Seventh Circuit and the district court here.

A. *Bousley* Expressly Limits the Showing of Actual Innocence to "More Serious" Offenses.

Bousley provides that the required showing of actual innocence extends to "more serious charges" forgone during plea bargaining. 523 U.S. at 624. As the Third Circuit held in *Lloyd*, this plain language precludes any requirement that the petitioner demonstrate actual

innocence of charges that are not more serious than the offense of conviction. 188 F.3d at 189 n.11. The court acknowledged that *Bousley*'s reference to "more serious charges" may be dictum, but held that it nonetheless "must be respected as a considered pronouncement to be followed in the federal system until and unless modified by the Supreme Court itself." *Id.* Accordingly, the court rejected the trial court's broader application of *Bousley* as "at odds with the Supreme Court's express formulation of the procedural conditions for relief." *Id.*

If the Court reaches this issue, it should follow the Third Circuit's lead and hold that the Supreme Court meant what it said when it restricted the actual innocence showing to "more serious" charges. That approach is consistent with this Court's cases, which instruct that "[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (internal quotation marks omitted). An offense that is merely "equally serious as" the offense of conviction is not enough, under *Bousley*'s plain language, to place the burden upon a defendant to prove actual innocence.

B. The Logic of *Bousley* Does Not Compel A Different Approach.

Notwithstanding *Bousley*'s clear language, the district court held that its logic extends to "equally serious" offenses. Adopting the analysis of the Seventh Circuit in *Lewis v. Peterson*, 329 F.3d 934 (2003), the court reasoned that "defendants who plead guilty might elect to go to trial and risk conviction if charged with a less serious offense, but rationally would maintain their guilty plea if charged with an equally serious or more serious offense encompassing the same conduct." App. 56–57.

This reasoning is flawed because it rests on the presumption that the defendant is determined to plead guilty rather than stand trial no matter the charge. Indeed, *Lewis* posited that "[t]he idea behind the [*Bousley*] rule is that had the government foreseen [that its principal charge would later become invalid,] it would not have dropped the [other] charge and so the petitioner, ***who we know wanted to plead guilty***, ***would probably have pleaded guilty to that charge instead***." 329 F.3d at 936 (emphasis added). The notion that a defendant enters into plea negotiations determined to plead guilty, and will therefore accept the charges that the government offers

interchangeably so long as they are of equal severity, is at odds with the realities of plea bargaining and plainly does not apply across the board if at all. A defendant's willingness to plead to a particular offense will depend on the factual bases for the charge, perceived collateral consequences associated with the offense, and other factors.

Moreover, *Bousley* applies only to charges forgone "in the course of plea bargaining." 523 U.S. at 624. When the government trades a more serious charge for the certainty of conviction on a lesser offense, it may fairly be said to have dismissed that charge "***in exchange for***" the defendant's guilty plea. *Id.* (emphasis added). But where the government merely forgoes an equally serious offense—which in all likelihood would not subject the defendant to any additional term of incarceration—the same cannot be said.[12]

The district court and the Seventh Circuit thus misread *Bousley* to require a petitioner to refute ***any*** charges that were abandoned by the government, even charges that the government may have unilaterally

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[12] Under 18 U.S.C. § 3584(a), multiple sentences imposed at the same time are presumed to run concurrently. While the sentencing court retains discretion to order consecutive sentences when warranted, this possibility is sufficiently unlikely—especially where, as here, the multiple offenses at issue all arise from one single act—that it is unlikely to affect a defendant's plea-bargaining decisions.

relinquished, rather than only those charges the government was required to forgo in exchange for the defendant's guilty plea. This Court should adhere to *Bousley*'s plain language and limit the actual innocence showing to forgone charges "more serious" than the offense of conviction.

CONCLUSION

The district court's order denying Caso's motion to vacate his conviction and sentence under 28 U.S.C. § 2255 should be reversed.

Respectfully submitted,

/s/ *Elizabeth G. Oyer*
Elizabeth G. Oyer (#501260)
Scott M. Noveck
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3000

Counsel for Appellant
Russell James Caso, Jr.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 9,089 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirement of Rule 32(a)(6) because it was been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point type for text and footnotes.

/s/ *Elizabeth G. Oyer*
Elizabeth G. Oyer

Counsel for Appellant
Russell James Caso, Jr.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 4, 2012, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system and by causing an original and eight copies to be delivered to the Clerk's office. I further certify that two copies were sent via overnight delivery to the following counsel:

Elizabeth Trosman
Ann K. H. Simon
U.S. ATTORNEY'S OFFICE
APPELLATE DIVISION
555 4th Street, N.W., Room 8243
Washington, D.C. 20530
(202) 252-6829

/s/ *Elizabeth G. Oyer*
Elizabeth G. Oyer

Counsel for Appellant
Russell James Caso, Jr.

STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

18 U.S.C. § 371 provides:

> **§ 371. Conspiracy to commit offense or to defraud United States**
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1001 provides:

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C. § 1343 provides:

> **§ 1343. Fraud by wire, radio, or television**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346 provides:

> **§ 1346. Definition of "scheme or artifice to defraud"**
>
> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

28 U.S.C. § 2255 provides:

> **§ 2255. Federal custody; remedies on motion attacking sentence**
>
> **(a)** A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> **(b)** Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> **(c)** A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> **(d)** An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.