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.)

REPLY BRIEF

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.

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INTRODUCTION

All parties agree that the single offense of which petitioner Caso was convicted—conspiracy to commit honest-services wire fraud by failing to disclose a conflict of interest—is not a crime in light of the Supreme Court's decision in *Skilling v. United States,* 130 S. Ct. 2896 (2010). All parties agree that Caso timely sought collateral relief from this invalid conviction. Nonetheless, the government claims that Caso is procedurally barred from obtaining habeas relief because he allegedly cannot prove his actual innocence of the separate, uncharged offense of making a false statement.

The government's position is unsupported by law or logic. First, the law is clear that a petitioner need only show actual innocence of "more serious" offenses forgone in the course of plea bargaining. Because the government concedes that a false statement is not "more serious" than honest services fraud, Caso is entitled to relief. Second, even if the Court required petitioners to demonstrate their innocence of "equally serious" uncharged offenses, a false statement is significantly ***less serious*** than honest services wire fraud. Indeed, false-statement offenses not only generate lower offense levels under the United States

Sentencing Guidelines than do honest services fraud offences, but they also are subject to lower statutory maximums. Finally, because Caso was never charged with making a false statement, the required showing of actual innocence does not extend to this offense. Accordingly, the district court's order denying Caso's petition should be reversed.

SUMMARY OF THE ARGUMENT

I. We address first the most conspicuous problem with the government's case: under any reasonable measure, the false-statement charge purportedly forgone in exchange for Caso's guilty plea is a ***less serious*** offense than the crime of honest-services wire fraud to which Caso pled guilty; therefore, no showing of actual innocence is required under *Bousley* to overcome Caso's procedural default.

A. The government concedes that the Sentencing Guidelines treat honest-services fraud as more serious than a false statement. That disparity is clear in this case. Because the offense conduct here was charged as honest-services wire fraud, Caso's initial offense level was 18, meaning he faced a recommended sentence of 18 to 24 months in prison. In contrast, had Caso been charged with a false statement, the Sentencing Guidelines would have generated an initial

offense level no higher than eight, which would have resulted in a recommended sentence of probation.

The Government offers no good reason to disregard the Guidelines. Its suggestion that the Court should disregard them because they are no longer "mandatory" ignores the central role the Guidelines continue to play in criminal cases and minimizes the United States Sentencing Commission's specialized expertise. The Supreme Court has expressly directed that the Guidelines are the mandatory starting point for calculating any sentence, and courts, including this one, have recognized that they remain the "anchor" of the sentencing process. Even the U.S. Attorneys' Manual expressly directs prosecutors, when making charging decisions, to ascertain the relative seriousness of offenses based on the recommended sentences yielded by the Guidelines.

B. The government similarly concedes that honest-services wire fraud in violation of 18 U.S.C. §§ 1343 and 1346 generates a higher statutory maximum sentence (20 years) than does a false statement in violation of 18 U.S.C. § 1001 (five years). Thus Congress, like the Sentencing Commission, has concluded that honest-services

wire fraud is more serious than a false statement. The fact that Caso agreed to plead guilty to honest-services fraud as the object of a conspiracy, which capped his sentencing exposure to five years, does not change the fact that Congress has judged honest-services fraud offenses to be more serious than false-statement offenses.

II. Even if the Court judged honest-services fraud to be "equally serious as" a false statement, Caso still would not be barred from bringing a habeas claim. That is because *Bousley* states that the actual-innocence requirement applies only "[i]n cases where the Government has forgone ***more serious*** charges." *Bousley v. United States*, 523 U.S. 614, 624 (1998) (emphasis added). The government asks the Court to extend *Bousley* beyond its literal terms and beyond the limits of its logic.

The single case on which the government relies found that *Bousley*'s "logic" applied to an equally serious forgone offense because, as a practical matter, the petitioner would have faced identical punishment if convicted of either offense. *See Lewis v. Peterson*, 329 F.3d 934, 937 (7th Cir. 2003). That reasoning is inapposite here, because Caso plainly would have faced a lesser sentence had he pled

guilty to a false statement. Moreover, this Court has expressly held that it is bound by the limits of reasoned dictum of the Supreme Court. Accordingly, the government's invitation to extend *Bousley* should be rejected as a matter of both reason and precedent.

III. Finally, all other obstacles aside, the government is wrong that Caso should be required to show his innocence of a false-statement offense that was never charged. There is nothing in the charging document—or elsewhere in the contemporaneous record—indicating that the government forwent a false-statement charge in plea bargaining with Caso. To overcome this absence of proof, the government asks for license to generate ***new*** evidence—through the post hoc declaration of a prosecutor—of its supposed intentions five years ago, when Caso pled guilty. This approach is fundamentally unsound in multiple respects. First, the charging document is the only objective and readily ascertainable measure of what if any charges were forgone in the course of plea bargaining. Second, the government's proposal would consume substantial judicial time and resources resolving a wholly collateral matter. Third, it would be manifestly unfair to the petitioner, as a prosecutor's testimony about his subjective

intentions during plea bargaining would be impossible to meaningfully refute. For precisely these reasons, we know of no court, other than the district court here, that has ever required a habeas petitioner to demonstrate actual innocence of an uncharged offense; on the contrary, the prevailing wisdom is that the petitioner need not prove his innocence of every charge that the government "could have brought." *See United States v. Duarte-Rosas*, 221 F. App'x 521, 522 (9th Cir. 2007).

In sum, the government's contention that Caso is procedurally barred from obtaining habeas relief rests on three disputed legal contentions: (1) that the showing of actual innocence required by *Bousley* extends to ***uncharged*** offenses purportedly forgone during plea bargaining, even where there is no evidence in the contemporaneous record that the charge was forgone in exchange for the defendant's plea; (2) that the required showing of actual innocence extends to ***equally serious*** forgone offenses; and (3) that the purportedly forgone false-statement offense is equally serious as the honest-services fraud offense of which Caso was convicted. If the Court disagrees with the government on any one of these issues, then Caso is

entitled to review of his petition on the merits. Because the government is wrong on all three issues, and because the merits of Caso's petition are undisputed, the Court should reverse the district court's order denying the petition.

ARGUMENT

I. A FALSE-STATEMENT OFFENSE IS LESS SERIOUS THAN HONEST-SERVICES WIRE FRAUD.

Perhaps most remarkable about the government's argument is its position that the offense of honest-services fraud is no more serious than the offense of making a false statement, notwithstanding that Caso indisputably would have faced substantially less punishment if convicted only of a false statement.

A. The Sentencing Guidelines Confirm That A False Statement Is A Less Serious Offense Than Honest-Services Fraud.

All parties agree that the Sentencing Guidelines treat honest-services fraud, which is governed by Guidelines Section 2C1.1, as a more serious offense than a false statement, which is governed by Section 2B1.1. The disparity can be seen clearly in this case. Because Caso was charged with honest-services fraud, the Guidelines generated

an initial offense level of 18.[1] In contrast, had Caso been charged with making a false statement, the Guidelines would have generated an initial offense level no higher than 8.[2] Thus, while honest-services fraud generated a recommended sentence of 18 to 24 months in prison, a false-statement offense would have generated a recommendation of probation. *See* Opening Br. 38 & nn.7–8.

As our opening brief explained, the Sentencing Guidelines are the best measure of the seriousness of an offense. *See* Opening Br. 31–37. Both the Third Circuit and the Eighth Circuit have held that "actual punishment as determined by the Guidelines is the proper basis for identifying the 'more serious charge.'" *United States v. Halter*, 217 F.3d 551, 553 (8th Cir. 2000); *accord United States v. Lloyd*, 188 F.3d 184, 189 n.13 (3d Cir. 1999). Both have explicitly rejected the government's insistence that courts should look solely to the maximum statutory

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[1] Applying Section 2C1.1, the District Court found that the base offense level for Caso's conduct was 14. It then increased the offense level by four points to reflect the value of the funds at issue, bringing his initial offense level to 18.

[2] Under Section 2B1.1, Caso's conduct would have generated a base offense level of six. That level could perhaps then have been increased by two levels to reflect his position of public trust. The total initial offense level thus would have been no higher than eight.

sentence. *Halter*, 217 F.3d at 553; *Lloyd*, 188 F.3d at 189 n.13. The government's efforts to distinguish those cases are unpersuasive, as are its arguments for focusing instead on maximum statutory sentences.

1. The Government's Suggestion That The Guidelines Are Irrelevant Post-*Booker* Is Baseless.

The government's suggestion that the Sentencing Guidelines are irrelevant to the *Bousley* analysis because they are no longer treated as mandatory blatantly ignores the law as well as the realities of sentencing. The government offers no response to our observation that courts are ***statutorily required*** to consider the Guidelines in imposing any sentence. Opening Br. 35–36; *see* 18 U.S.C. § 3553(a)(4); *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007) ("The fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.").

Accordingly, courts have widely recognized the important role that the Guidelines continue to play in post-*Booker* sentencing. The Supreme Court has directed that "a district court should begin all

sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall*, 552 U.S. at 49 (citation omitted). This Court has similarly observed that "[p]ractically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences judges impose." *United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008); *accord, e.g.*, *United States v. Wetherald*, 636 F.3d 1315, 1321 (11th Cir. 2011) ("It is true that the Guidelines are no longer mandatory, but neither are they without force. The simple reality of sentencing is that a 'sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines.'") (quoting *Rita v. United States,* 551 U.S. 338, 351 (2007)), *cert. denied,* 132 S. Ct. 360 (2011); *United States v. Ibarra-Luna*, 628 F.3d 712, 717 (5th Cir. 2010) ("It is established that a district court must consider the applicable Guidelines range."); *United States v. Lewis*, 606 F.3d 193, 201 (4th Cir. 2010).

Indeed, the government itself treats the Guidelines as the proper measure of the relative seriousness of offenses even after *Booker*. As discussed in our opening brief, the U.S. Attorneys' Manual, which directs prosecutors to charge "the most serious offense" consistent with the defendant's conduct, expressly provides: "The 'most serious' offense is generally that which yields the highest range under the sentencing guidelines." Opening Br. 33–34 (quoting U.S. Attorneys' Manual § 9-27.300). It is for precisely this reason that Caso was charged with honest-services fraud, rather than the lesser offense of making a false statement.

As all of this authority reflects, it is just as true today as it was before *Booker* that the Guidelines are the best available measure of "actual punishment," and therefore the proper benchmark of the relative seriousness of offenses under *Bousley*. *See* Opening Br. 31–37. The government does not explain why the relative seriousness of two crimes should be any different after *Booker* than before it. If the government were correct that "[s]tatutory maximum penalties are the appropriate measure" because they "reflect[] Congress's judgment" about the seriousness of an offense (Gov't Br. 30), that should have been

true before *Booker* as well. The government's proffered basis for distinguishing *Halter* and *Lloyd* therefore fails.

Aside from the district court decision in this case, no court has ever accepted the government's position that *Booker* rendered the Guidelines irrelevant to the *Bousley* analysis. At least two courts have expressly rejected this view. *See* Opening Br. 34 (citing *Castillo v. United States*, No. 1:09-cv-04222-ENV, 2011 WL 4592829, at *4 (E.D.N.Y. Sept. 30, 2011), and *Short v. United States*, No. 4:09-cv-00763-CAS, 2010 WL 682311, at *4 (E.D. Mo. Feb. 23, 2010)).

The government likewise fails to identify a single case adopting its position that maximum statutory sentences, rather than the Sentencing Guidelines, are the proper focus under *Bousley*. It attempts to invoke *Vanwinkle v. United States*, but that case did not decide this question; instead, the court simply stated in a footnote that it would accept the defendant's "conce[ssion]" of the issue. 645 F.3d 365, 369 n.2 (6th Cir. 2011). Even further afield is the government's citation to *Peveler v. United States*, where the court looked to the mandatory ***minimum*** sentence for the forgone offenses. 269 F.3d 693, 700 (6th Cir. 2001). The court noted that the petitioner received an actual sentence for his

conviction of 181 months (*id.* at 696), but the mandatory minimum for the forgone offenses would have been 240 months (*id.* at 700). *Peveler* in fact supports our approach, where the court must look to the sentence that a defendant would ***actually*** have expected to receive—which is ordinarily determined by the Sentencing Guidelines, subject to any mandatory minimum—rather than the government's focus on theoretical maximums. And in *Alcock v. Spitzer*, the court did not (contrary to the government's suggestion) base its decision on a maximum statutory sentence, but instead observed that the two state offenses at issue carried the exact same sentencing range under state law—just as if two federal offenses carried the same Guidelines range. 349 F. Supp. 2d 630, 637 (E.D.N.Y. 2004).

Courts and parties continue to use the Sentencing Guidelines every day to guide their decisionmaking in sentencing and plea bargaining. *See, e.g.*, Jeffrey Ulmer & Michael T. Light, *Beyond Disparity: Changes in Federal Sentencing After* Booker *and* Gall*?*, 23 Fed. Sent'g Rep. 333, 340 (2011) (observing "the continued reliance on Guideline sentence recommendations after *Booker*" because federal prosecutors "still push for conformity to the Guidelines in sentence

recommendations they make connected to plea agreements"). There is simply no persuasive reason that this Court should deem them inapplicable here.

2. Caso's Cooperation Does Not Change The Guidelines' Assessment Of The Seriousness Of The Offense.

The government suggests that the Guidelines are not relevant here because Caso received a below-Guidelines probationary sentence, and therefore "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.'" Gov't Br. 35 n.17 (quoting *Lewis*, 329 F.3d at 937).

This is both factually and legally incorrect. To begin, Caso was sentenced to 170 days of home confinement, in addition to his term of probation. Had Caso pled guilty to a false statement, the Guidelines would have yielded a recommendation that he serve probation without any condition of home confinement. *See* U.S.S.G. § 5B1.1. Moreover, Caso's below-Guidelines sentence was the product of the government's § 5K1.1 motion, which was predicated on Caso's substantial and extensive assistance to the government. *See* Dist. Ct. Dkt. No. 24

(Statement of Reasons). That his cooperation was valuable says nothing about the relative seriousness of honest-services fraud and false statements.

3. The Government's Remaining Quibbles With The Guidelines Approach Are Meritless.

The government next argues that the Guidelines do not in fact measure the seriousness of an offense, because they take into account factors including "applicable adjustments" (for example, for acceptance of responsibility) and "the offender's criminal history." Gov't Br. 34–35. These considerations do not mean that the Guidelines are not focused on an offense's seriousness; on the contrary, these factors often serve as "refining criteria" (*Lloyd*, 188 F.3d at 189 n.13) that help to better measure it. Indeed, the introductory note to the Guidelines Manual reflects that the Sentencing Commission is cognizant that, in authorizing the Guidelines, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." U.S.S.G. § 1A1.3, at 2.

Moreover, the factors that the government has identified here apply equally to the purportedly forgone offense and the offense of

conviction, and therefore do not affect the ***relative*** seriousness of the offenses. Caso would have received a downward adjustment for acceptance of responsibility whether convicted of a false statement or of honest-services fraud. And Caso's lack of any prior criminal conduct would place him in criminal history Category I regardless of the offense at issue. Accounting for both of these factors, the purportedly forgone false-statement charge is plainly less serious than the honest-services fraud offense of which he was convicted.

The government's claim that there would be "practical impediments to a Guidelines-based approach" (Gov't Br. 36) is similarly unpersuasive. First, the argument that the Guidelines approach would treat certain felonies as less or equally serious as certain misdemeanors (*see id.*) rests on an apples-to-oranges comparison of the recommended Guidelines sentence for a felony offense to the statutory maximum sentence for a misdemeanor offense. While the Guidelines calculate actual recommended punishment, the offense classifications set forth in 18 U.S.C. § 3559(a), on which the government relies, are based solely on statutory maximum penalties. Presumably even the government would agree that the relative seriousness of two offenses cannot be measured

by comparing the statutory maximum for one offense to the Guidelines range for the other.

The government also complains that there is "a level of uncertainty" when "determining the appropriate sentencing guidelines range." Gov't Br. 36. But courts confront and resolve these uncertainties in sentencing on a daily basis. Rarely will this "uncertainty" pose any real "impediment." Notably, while courts have been using the Guidelines in connection with *Bousley* for many years, the government fails to cite even a single opinion expressing any difficulty with this assessment. The government ultimately offers no reason to depart from the considered approach that courts have consistently followed for well over a decade.[3]

[3] The government observes that in this case, there was a dispute between prosecutors and defense counsel at sentencing as to which Guideline should apply to determine the base offense level—§ 2B1.1 (for offenses involving deceit) or § 2C1.1 (for honest services fraud). The government's view prevailed, and Caso was sentenced under § 2C1.1. This application of the Guidelines is not being relitigated in this collateral proceeding. Accordingly, the fact that Caso arguably could have been sentenced under a different Guideline is irrelevant here.

B. Even Looking To Statutory Maximums, A False Statement Is Less Serious Than Honest-Services Fraud.

Even if the Court were to accept that statutory maximum sentences are controlling, the district court erred by looking to the wrong statutory sentence for honest-services fraud. In comparing the maximum sentences for the charged and purportedly forgone offenses, the district court relied on the five-year maximum sentence for the offense of conspiracy to commit an offense against the United States (18 U.S.C. § 371). But as our opening brief explained, if a court seeks to discern Congress's judgment about the severity of a conspiracy charge, it must look to the statutory sentence for the ***object offense***. *See* Opening Br. 39–40. Otherwise, all offenses charged as conspiracies under § 371—as any federal offense may be—would be deemed equally serious.[4]

The government refutes this argument by pointing out that certain conspiracies can be charged under statutes other than § 371,

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[4] The Sentencing Guidelines likewise determine the sentencing range for a conspiracy offense by looking to the object offense. *See* U.S.S.G. § 2X1.1(a) (base offense level for a conspiracy offense is equal to "[t]he base offense level from the guideline for the substantive offense, plus any adjustments from such guideline").

which carry higher statutory maximums. Gov't Br. 32 & n.14. For example, the government says that if conspiracy to commit murder were charged under § 1117 instead of § 371, it would carry a maximum sentence of life imprisonment. This is precisely our point. Conspiracy to commit murder is plainly a more serious offense than conspiracy to commit honest-services fraud, notwithstanding that both can be charged under § 371, in which case both would carry a five-year maximum penalty. Similarly, Caso's offense of conspiracy to commit honest-services wire fraud ***could have been*** charged under 18 U.S.C. § 1349 (conspiracy to commit mail or wire fraud), in which case it would carry a maximum penalty of twenty years, consistent with the maximum penalty for the substantive offense of honest-services wire fraud. That it was charged instead under § 371 does not mean that Congress views conspiracy to commit honest-services fraud as equally serious as conspiracy to make a false statement.

The maximum statutory sentence for the object offense of honest-services wire fraud is 20 years, rather than the five-year maximum the district court considered. *See* 18 U.S.C. § 1343. By contrast, a false statement under 18 U.S.C. § 1001 carries a maximum sentence of only

five years. Accordingly, the latter is a less serious offense even under the government's approach, and thus it falls outside *Bousley*'s purview.

II. *BOUSLEY* SHOULD NOT BE EXTENDED TO OFFENSES THAT ARE ONLY "EQUALLY SERIOUS AS" THE CRIME OF CONVICTION.

The government insists that *Bousley* itself requires Caso to prove his innocence of forgone charges that are just "equally serious as" the crime of conviction. But the Court's language in *Bousley* is unambiguous: "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 (emphasis added).

The government does not claim that its position can be reconciled with the Supreme Court's articulation of the *Bousley* standard. Instead, it dismisses the Court's language as "apparent dictum." Gov't Br. 21 (internal quotation marks omitted). But this Court has refused to disregard the Supreme Court's pronouncements on that basis: "Carefully 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). And as the Third Circuit has put it, the government's position is "at odds with the Supreme Court's express formulation of the procedural conditions for relief." *Lloyd*, 188 F.3d at 189 n.11.[5]

The Court should likewise reject the government's reliance on *Lewis v. Peterson*, 329 F.3d 934 (7th Cir. 2003). First and foremost, the logic of *Lewis* plainly does not apply to the facts here. *Lewis* reasoned that the petitioner "would have gained little or nothing had the government and he realized that the charge to which he pleaded guilty was unsound," because the government simply would have "switched the plea to the sound charge" and thus "***the punishment would probably have been the same.***" *Id.* at 937 (emphasis added). That is not true here. Although the government argues that the two offenses here are equally ***serious***, it does not contend—nor could it—that they would in fact receive identical ***punishments***. As we have explained

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[5] The government suggests that *Bousley* itself "contemplated" that the actual innocence showing would extend to equally serious forgone charges, because the forgone charge in *Bousley* was, in the government's view, equally serious as the offense of conviction. Gov't Br. 17–18. The government's assertion that the two offenses were equally serious apparently rests on the presumption that statutory maximums are controlling, which we have refuted elsewhere. But in any event, the Court in *Bousley* did not address or render any holding as to the relative seriousness of the offenses at issue.

elsewhere, had Caso pled guilty to making a false statement, rather than conspiracy to commit honest-services wire fraud, he would have faced a purely probationary sentence; instead, he was sentenced to six months of home confinement in addition to a term of probation. *See* pp. 7–8, *supra*; Opening Br. 37–39.[6] It cannot be said, then, that Caso would have gained little or nothing had he pled guilty to a false statement instead.

Second, *Lewis* rests on the flawed assumption that the defendant will be determined to plead guilty rather than stand trial no matter what the charge. In fact, the decision to plead guilty to a different charge may depend on a variety of factors, including the factual basis for the charge and the perceived strength of various defenses. *See* Opening Br. 43–44. In response, the government claims that *Lewis* "acknowledged the possibility that a defendant may not have wanted to plead guilty if he had known that one offense was invalid" (Gov't Br. 19

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[6] The government's reliance on *Lewis* is also inconsistent with its position that statutory maximum sentences are the relevant point of comparison. *Lewis* expressly references the ***actual punishment*** that a defendant would face—which is measured by the Sentencing Guidelines—as the relevant measure. *See Lewis*, 329 F.3d at 937. Thus, if *Lewis*'s reasoning is correct, it cannot also be the case that Guidelines sentencing ranges are irrelevant.

n.8), but that is incorrect. *Lewis* considered only the possibility that "if [the defendant] learns that one charge is invalid he may ***hold out for a better deal*** on the other." 329 F.3d at 936 (emphasis added). *Lewis* thus contemplated that the defendant might obtain a better plea agreement, but still assumed—without justification—that the defendant would always plead guilty on any alternative charge rather than stand trial.

More fundamentally, the government neglects that *Bousley*'s actual-innocence requirement applies only to charges "forgone . . . ***in the course of*** plea bargaining" and "***in exchange for***" the defendant's guilty plea. *Bousley*, 523 U.S. at 624 (emphasis added). As we have explained, while defendants have clear incentives to bargain over the more serious charges, they may have no motive to negotiate over the addition of less serious or equally serious charges, because those charges often have no bearing on the punishment a defendant will serve. *See* Opening Br. 44–45 & n.12. The government might decide not to pursue equally serious or less serious charges for any number of reasons, even though it is not compelled to forgo those charges in order to obtain a guilty plea. But *Bousley* does not require a defendant to

prove his innocence of charges that the government unilaterally abandons. The logic of *Bousley* therefore does not extend to equally serious crimes, just as it does not apply to less serious crimes.

III. THE GOVERNMENT CANNOT ESTABLISH THAT IT FORWENT A FALSE-STATEMENT CHARGE IN EXCHANGE FOR CASO'S GUILTY PLEA.

A final problem with the government's argument is that it cannot establish that it actually forwent a false statement charge in exchange for Caso's guilty plea.[7] Caso was never charged with a false statement, nor is there any evidence in the contemporaneous record that the

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[7] Although we do not believe this case turns on any issues of fact, we note that the government misstates the standard of review. The government incorrectly claims that findings of fact in a 28 U.S.C. § 2255 proceeding are always reviewed for clear error. Gov't Br. 14; *see also* Gov't Br. 26. "But where, as here, the district court does not hold an evidentiary hearing . . . review is strictly *de novo*." *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011) (citing *Boltz v. Mullin*, 415 F.3d 1215, 1221–22 (10th Cir. 2005)), *cert. denied*, 132 S. Ct. 1818 (2012); *accord Northrop v. Trippett*, 265 F.3d 372, 377 (6th Cir. 2001) ("When a district court decides a habeas petition without evidentiary hearing, we review that district court's factual findings *de novo*."); *Armienti v. United States*, 234 F.3d 820, 822 (2d Cir. 2000) ("Because the district court held no hearing on Armienti's petition for a writ of habeas corpus before denying it . . . we review the denial *de novo*."). *De novo* review is proper because, as in a summary judgment appeal, this Court is "in the same position to evaluate the factual record as [the lower court] was." *Boltz*, 415 F.3d at 1221 (internal quotation marks omitted).

government forwent such a charge in the course of plea bargaining. Accordingly, the government seeks license to create and present new evidence of its supposed intentions at the time of plea negotiations which took place five years ago. As we acknowledge in our opening brief, *Bousley* is not perfectly clear on how a court should determine what if any charges were forgone in the course of plea bargaining. *See* Opening Br. 18–20 & n.3. But we maintain that the better reading of *Bousley*—and the approach followed by other courts—is to limit the inquiry to the charging document. And even if the Court were inclined to consider other evidence, it should limit the inquiry to the contemporaneous record, as it existed at the time the plea was entered. To entertain new evidence, created for the express purpose of opposing habeas relief, is inconsistent with *Bousley*, inefficient, and unfair to the petitioner.

A. Caso Is Not Required To Prove His Innocence Of An Uncharged False-Statement Offense.

The government does not dispute that courts applying *Bousley* have uniformly relied on the charging document to determine what charges were forgone; no court has ever extended *Bousley*'s actual-innocence requirement to uncharged offenses. *See* Opening Br. 21–24.

This approach makes sense, because the indictment or information is typically the only available evidence—and the only objective evidence—of which charges, if any, were forgone in the course of plea bargaining. Any other approach would require the habeas court to conduct an unnecessarily complex and burdensome inquiry into the parties' thought processes during plea negotiations, which there ultimately is no objective or reliable way to ascertain.

The government insists that "[l]ooking beyond the charging document . . . is not unworkable" because, it asserts, "the inquiry is not burdensome" in this case. Gov't Br. 28–29. That assertion ignores our point that the district court here avoided a full-fledged evidentiary hearing only by accepting at face value the post hoc declaration of a prosecutor, without affording Caso an opportunity to refute that evidence. *See* Opening Br. 26. Moreover, in many other cases, the government's approach will necessarily require a far more extensive and time-consuming inquiry into this wholly collateral matter.

But the problems with the government's approach go beyond mere administrative burdens. First, it would countenance an intrusive inquiry into the thought processes and case assessments of the parties

and their counsel—deliberations that are legally sacrosanct and ordinarily protected from judicial intrusion. Second, there is little reason to think that post hoc evidence would offer meaningful insight into the original charging decision. Typically there will be no means of ascertaining the government's intentions except through the prosecutor's own testimony—and there is no fair or realistic means for a habeas petitioner to refute evidence that exists solely in the mind of the prosecutor. And of course there will always be some additional offense that ostensibly could have or would have been charged. Because a post hoc evidentiary hearing is thus unlikely to yield reliable proof of the government's intentions, the inquiry should be limited to the indictment or information.

B. The Government Cannot Rely On Newly Created Evidence To Prove That It Forwent A False-Statement Charge In Exchange For Caso's Plea.

Even if we accept that *Bousley* gives courts license to look beyond the charging document to other "record evidence," it plainly does not countenance the ***creation of new evidence*** for the purpose of proving after the fact that a charge was forgone. As we acknowledge in our opening brief, it is conceivable that record evidence could exist outside

the indictment or information demonstrating that an additional charge was forgone in the course of plea negotiations. For example, the written plea agreement between the parties might contain an express statement of other offenses that would not be charge. To the extent that the Court is inclined to entertain record evidence outside the charging document, it should limit the inquiry to this sort of ***contemporaneous*** memorialization of the parties' intentions, while excluding post hoc evidence created for the sole purpose of opposing habeas relief.

Here, the government relies chiefly on the newly created declaration of a prosecutor to establish that it purportedly forwent a false-statement charge in exchange for Caso's guilty plea to honest-services fraud. The government cites *Bousley* for the proposition that the district court properly considered this evidence, noting that "habeas proceedings often involve evidentiary hearings and further factual development of the record." Gov't Br. 27 n.13. Yet *Bousley* in fact undermines the government's contention that courts may consider ***new*** evidence, in lieu of contemporaneous evidence, to show what charges were forgone in the course of plea bargaining. In the sentence quoted

by the government, *Bousley* held that "the Government is not limited to the existing record" on the ***merits*** of the petitioner's claim of innocence, and it remanded the case for further evidentiary development on that issue. 523 U.S. at 624. By contrast, the Court did ***not*** afford the government an opportunity to adduce new evidence on the collateral issue of whether it forwent other charges. Instead, in rejecting the government's argument that the petitioner should have been required to show actual innocence of the uncharged offense of carrying a firearm in connection with a drug-trafficking crime, the Court considered only the existing record. *See* Opening Br. 19–20. If the government's reading were correct, the Court should have remanded this issue to afford the government an opportunity to submit new or additional evidence, yet the Court did not do so.

It is for good reason that the *Bousley* Court did not give the government *carte blanche* to introduce new evidence. Allowing the government to generate evidence that did not exist at the time of the plea negotiations would empower it to foreclose a petitioner's access to habeas relief based on nothing more than a post hoc assertion that there was some additional charge that could or would have been

pursued. That would be inconsistent with a court's duty to independently scrutinize a petitioner's claim to habeas relief. The better approach is to confine the inquiry to the record that existed at the time of plea negotiations—or, as other courts have done, to apply *Bousley*'s actual-innocence requirement to only those charges that were included in the charging instrument.

The government contends that this limitation would "ignore[] the practical realities of pre-indictment plea bargaining" because, in such cases, "the charging document typically does not memorialize the full charging decision." Gov't Br. 25. The solution to this dilemma, to the extent it is a real one, is for the government to memorialize its charging decision in the contemporaneous record—for example, through a written statement in the parties' plea agreement. That is the only way to create an objective and reliable record that the charges were dropped "in the course of plea bargaining" (*Bousley*, 523 U.S. at 624). Otherwise, there is no way to distinguish charges that the government actually forwent "in exchange for" the defendant's guilty plea (*id.*) from charges that could have been but were not brought for some other reason (or for no reason at all). *Bousley* does not make a defendant

responsible for disproving uncharged offenses other than those that the government specifically agrees to forgo in exchange for a guilty plea.[8]

C. There Is No Evidence In The Contemporaneous Record That The Government Forwent A False-Statement Charge.

In this case, there is nothing in the contemporaneous record that shows a forgone false-statement charge. The government cites the Statement of the Offense and the Information, asserting that these documents enumerate "the elements of making a false statement in violation of 18 U.S.C. § 1001." Gov't Br. 26–27. But this goes only to whether a false statement ***could have been*** charged—*i.e.*, whether a factual basis may have existed for such a charge—and not to the essential question of whether such a charge was ***actually*** forgone in exchange for Caso's guilty plea. The government also cites statements

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[8] The government further asserts that Caso's due process rights are not at issue because the government has invoked the purported false-statement offense in a collateral proceeding instead of the original criminal proceeding. *See* Gov't Br. 20 n.9. But the cases it cites say only that when a defendant brings a collateral attack on his conviction, he bears the burden of disproving ***the crime of conviction***. The government cannot point to a single case placing the burden on a defendant to disprove an offense of which he has never been convicted (or even indicted). As we explained in our opening brief, that would turn the constitutional presumption of innocence on its head. *See* Opening Br. 27–29.

by Caso's trial counsel arguing that the conduct at issue was more akin to a false statement than honest-services fraud. Gov't Br. 28. These statements relate only to the nature of the underlying conduct for purposes of determining the applicable sentencing guideline; again, they are not evidence that the government forwent a false-statement charge in exchange for Caso's guilty plea. Because no false-statement charge is contained in the Information, and because there is no other record evidence that the government forwent a false statement charge in exchange for Caso's guilty plea, Caso is not required under *Bousley* to demonstrate actual innocence of such an offense.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our opening brief, 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 Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,390 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 has 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 August 1, 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
John P. Mannarino
May Ann Snow
Lauren R. Bates
UNITED STATES ATTORNEY'S OFFICE
555 4th Street, N.W., Room 8104
Washington, D.C. 20530
(202) 252-6829

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

Counsel for Appellant
Russell James Caso, Jr.