SUPREME COURT OF THE UNITED STATES

BEATRICE MUNYENYEZI
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

APPENDIX

Table of Contents

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Beatrice Munyenyezi,
Petitioner

v.

Case No. 16-cv-402-SM
Opinion No. 2019 DNH 178

United States of America,
Respondent

O R D E R

In 2010, a grand jury charged Beatrice Munyenyezi with having unlawfully procured citizenship or naturalization, in violation of 18 U.S.C. § 1425(a) (Count One) and 1425(b) (Count Two). In February of 2013, a petit jury convicted her on both counts. She was sentenced to concurrent terms of imprisonment of 120 months and, pursuant to 8 U.S.C. § 1451(e), the court revoked her citizenship. Munyenyezi's convictions and sentence were affirmed on appeal. United States v. Munyenyezi, 781 F.3d 532 (1st Cir. 2015).

Subsequently, Munyenyezi filed a petition seeking habeas corpus relief, pursuant to 28 U.S.C. § 2255. In it, she asserted that defense counsel provided constitutionally deficient representation; the government failed to disclose exculpatory material prior to trial; and she was entitled to

sentence relief under Johnson v. United States, 135 S. Ct. 2551 (2015). Then, after the Supreme Court issued its opinion in Maslenjak v. United States, 137 S. Ct. 1918 (2017), Munyenyezi amended her petition to allege an additional ground for habeas relief: that the jury had been improperly instructed on the element of "materiality." The court denied Munyenyezi's habeas petition, concluding that she was not denied effective assistance of counsel, and neither her Brady claim nor her Johnson claim had merit. It did not specifically discuss her Maslenjak claim regarding the allegedly defective jury instructions on materiality.

Munyenyezi sought, and obtained, a certificate of appealability as to one issue: whether "the jury was given inaccurate instructions on her criminal liability" under Maslenjak. The court of appeals vacated the judgment denying Munyenyezi's habeas petition and remanded the matter so this court might "address petitioner's Maslenjak claim in the first instance." Judgment of the Court of Appeals (document no. 19) at 1.

For the reasons discussed, the court concludes that Munyenyezi is not entitled to habeas relief on the grounds asserted and, therefore, her petition is denied.

Discussion

I. Background.

Beatrice Munyenyezi is a Hutu from Rwanda. The factual background describing her involvement in the 1994 Rwandan genocide - during which Hutus murdered hundreds of thousands of Tutsis - is set forth in the court of appeals' decision. See United States v. Munyenyezi, 781 F.3d 532 (2015). By way of background, the court observed that:

> Over the course of 100 days, roving bands of Hutus (Rwanda's majority ethnic group) slaughtered hundreds of thousands of their countrymen, most of them Tutsis (a minority group long-dominant in Rwanda). Some of the crazed killers belonged to the Interahamwe, the dreaded militia of a Hutu political party known by the initials, MRND. About 7,000 Rwandans died each day, often butchered by machete-wielding Interahamwes at roadblocks set up to catch fleeing Tutsis. And these killers didn't just kill - they raped, tortured, and disfigured too.

Id. at 535. The evidence at trial overwhelmingly established, beyond any reasonable doubt, that Munyenyezi was associated with the National Republican Movement for Democracy and Development, also known as the "MRND," and that she oversaw one of the infamous roadblocks at which so many Tutsi's were murdered. As noted by the court of appeals,

> [Vestine Nyiraminani] testified that in April 1994 she and her sister got stopped at the roadblock near the Hotel Ihuriro. . . . Seeing that their cards identified them as Tutsis, Munyenyezi ordered them to

> sit at the side of the road with other Tutsis. A half hour later, soldiers marched them into the woods. One of the thugs then plunged a knife into Nyiraminani's sister's head. Nyiraminani escaped. But she never saw her sister again.
>
> Jean Paul Rutaganda testified about a time in April 1994 when (as a 15 year old) he and some other Tutsis hid at an Episcopal school near the Hotel Ihuriro. Rutaganda spotted Munyenyezi (he knew her by name) at the roadblock with Interahamwes, wearing an MRND uniform, asking for identity cards, and writing in a notebook. "She was counting," Rutaganda said, "registering dead Tutsis and others who were not yet dead." Tutsis, he added, "were killed day and night" in the nearby forest - something he knew from the "screaming" and the "crying."
>
> Tutsi Consolee Mukeshimana also saw Munyenyezi around this time. Mukeshimana had seen her before (at Mukeshimana's sister's house). And at the roadblock Mukeshimana watched a fatigues-wearing Munyenyezi check IDs and lead Tutsis to other "Interahamwe so they could get killed."
>
> Desperate to leave Butare because of the killing, Tutsi Vincent Sibomana tried to run but got detained at the roadblock. Munyenyezi asked for an ID. He knew who she was because he had seen her buy beer at a store where he had worked. And he had also seen an MRND-shirt-wearing Munyenyezi walking around Butare. Anyhow, Sibomana was too young to have an ID card, apparently (he was only 14). An irate Interahamwe hit his head with a rifle butt. And he fell into a ditch. More Tutsis were there. "Beatrice" - to quote Sibomana's testimony - then told the other Interahamwes to "kill" them all. Sibomana bolted. But he saw and heard Tutsis "being killed," hacked by "machetes" and bludgeoned with "clubs."

Id. at 537. See also Id. at 538 ("[D]ressed as an Interahamwe, she personally inspected IDs at the checkpoint, separated those

who would live from those who would die (and die gruesomely), and kept records of the ghastly going-ons.").

It was also established at trial - again, beyond any reasonable doubt - that Munyenyezi lied (repeatedly) on various documents that she submitted in support of her application for entry into the country as a refugee, including the "Rwandan Questionnaire"[1] for visa applicants, her application for permanent residence, and, most importantly for present purposes, her application for naturalization. The government also established that Munyenyezi lied to immigration officials to conceal her participation, both directly and as an aider and abettor, in kidnapping, false imprisonment, rape, and murder - all in connection with the 1994 Rwandan genocide.

At issue is Munyenyezi's conviction on Count One of the indictment, which charged her with having knowingly procured her naturalization contrary to law - that is, by knowingly providing false information as to material facts in her Application for Naturalization, Form N-400 – in violation of 18 U.S.C. §

[1] In the wake of the genocide, United States immigration officials prepared (and employed) the so-called "Rwandan Questionnaire" in an effort to help determine which visa and refugee applicants may have participated in the genocide. See generally Testimony of Donald Heflin, Trial Transcript, Day 6 (document no. 285) at 7-18.

1425(a). In her amended petition seeking habeas corpus relief, Munyenyezi asserts that the jury was improperly instructed on the definition of "material" and, therefore, her conviction on Count One must be overturned and a new trial ordered. See Amended Petition (document no. 11) at 3.[2]

II. Maslenjak, Section 1425(a), and "Materiality"

Like Beatrice Munyenyezi, Divna Maslenjak was convicted of having procured her naturalization contrary to law, in violation of 18 U.S.C. § 1425(a) - that is, by having provided false statements to immigration authorities, in violation of 18 U.S.C. § 1001. At Maslenjak's trial, the trial judge instructed the jury that conviction was proper so long as the government "proved that one of the defendant's statements was false - even if the statement was not 'material' and 'did not influence the decision to approve her naturalization.'" Maslenjak, 137 S. Ct.

[2] The government asserts that Munyenyezi's conviction on Count Two of the indictment - that is, having unlawfully obtained naturalization in violation of 18 U.S.C. § 1425(b) - is not implicated by the Maslenjak decision. Munyenyezi disagrees, asserting that it is possible that the jury convicted her on Count Two based upon her materially false statements to immigration authorities (and not because she otherwise lacked "good moral character"). Consequently, she says the jury should have been instructed on Maslenjak's "causality" element of materiality. Even assuming Munyenyezi's conviction on Count Two is implicated by Maslenjak, it does not alter the court's analysis or its conclusion that any error in the jury instructions under the later-decided Maslenjak case was harmless beyond a reasonable doubt.

at 1924. On appeal, the Supreme Court considered a fairly simple and straightforward question: whether "a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement." Id. at 1932 (Alito, J. concurring) (quoting Petition for Certiorari).

Unsurprisingly, the Court answered that question in the negative. To obtain a conviction under section 1425(a) based upon a false statement, the government must prove the false statement to immigration authorities was "material." But, in so doing, the Court arguably created a more demanding definition of "materiality" than had previously been thought to apply.

Before Maslenjak, the Court had explained that, "It has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation." Kungys v. United States, 485 U.S. 759, 771 (1988) (emphasis in original). Accordingly the Court held that:

> We think it safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of affecting,

> i.e., had a natural tendency to affect, the official decision. The official decision in question, of course, is whether the applicant meets the requirements for citizenship, so that the test more specifically is whether the misrepresentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified.
>
> * * *
>
> We hold, therefore, that the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service.

Kungys, 485 U.S. at 771-72 (emphasis supplied).

The Maslenjak Court did not expressly overrule, or even question, the opinion in Kungys. Indeed, in explaining the "materiality" requirement of section 1425(a), the Court repeatedly relied upon the Kungys opinion (and the concurring opinions of various justices who agreed with the outcome of Kungys). And, yet, the two opinions are difficult to reconcile. Under Maslenjak, a false statement is "material" only if (1) it concealed a fact that was so significant that it would have immediately disqualified the applicant for naturalization, or (2) the misrepresented fact:

> was sufficiently relevant to one or another naturalization criterion that it would have prompted reasonable officials, seeking only evidence concerning citizenship qualifications, to undertake further investigation. If that much is true, the inquiry

> turns to the prospect that such an investigation would have borne disqualifying fruit. As to that second link in the causal chain, the Government need not show definitively that its investigation would have unearthed a disqualifying fact (though, of course, it may). Rather, the Government need only establish that the investigation "would predictably have disclosed" some legal disqualification.

Maslenjak, 137 S. Ct. at 1929 (emphasis supplied). It would seem, then, that if a misstatement did not conceal an immediately disqualifying fact, the government must prove that, had the applicant been truthful, the government would have undertaken further investigation and that investigation "would predictably have disclosed" a disqualifying fact. That language is difficult to reconcile with the statement in Kungys, quoted above, that "It has never been the test of materiality that the misrepresentation or concealment would . . . . more likely than not have triggered an investigation." Kungys, 485 U.S. at 771 (emphasis in original).[3]

Nevertheless, while the precise impact of Maslenjak may be somewhat unclear (say, in prosecutions under 18 U.S.C. § 1001), this much can be said with relative confidence: in order to

[3] The Court's opinion in Kungys is, to be sure, "maddeningly fractured." United States v. Latchin, 554 F.3d 709, 713 (7th Cir. 2009) (attempting to summarize the holding of the majority of justices in Kungys). Maslenjak, then, should be read as clarifying Kungys.

convict a defendant for violating 18 U.S.C. § 1425(a) by having provided false statements, Maslenjak requires the jury to find a direct causal connection between the defendant's false statement(s) and the awarding of his or her naturalization. In such prosecutions, a false statement that could have had "a natural tendency to influence" the decisionmaker is not, it would seem, sufficient. Rather, the facts misrepresented by the defendant either must have themselves been disqualifying, or the government must demonstrate that, had the facts not been misstated, reasonable officials would have undertaken further investigation which, in turn, would "predictably have disclosed" defendant's ineligibility for citizenship. Maslenjak, 137 S. Ct. at 1929. See also Id. at 1923.

III. The Jury Instructions at Issue.

In its instructions to Munyenyezi's jury, the court instructed that one of the essential elements of Court One, which the government must prove beyond a reasonable doubt, is that "the defendant knowingly and intentionally provided materially false statements on her Application for Naturalization, Form N-400." Jury Instructions, United States v. Munyenyezi. No. 10-cr-85-SM (document no. 110), at 18. With regard to the "materiality" element, the court instructed the jury as follows:

> A statement is "material" if it has a natural tendency to influence or to be capable of influencing the decision of the decisionmaker to which it was addressed. So, in this case, a false statement is "material" if the statement would have warranted a denial or citizenship, or the statement had a natural tendency to influence, or was capable of influencing the decision of a government agency in making a determination required to be made.

Id. at 21. While the highlighted portion of the instruction is consistent with the Supreme Court's then-controlling opinion in Kungys, it arguably falls short of explaining to the jury the more significant causality requirement imposed by Maslenjak. The court therefore assumes, for purposes of resolving this petition, that its "materiality" instruction to the jury was deficient under Maslenjak's requirements.

But, that does not end the inquiry. That the jury was erroneously instructed on the materiality element does not automatically entitle Munyenyezi to the habeas relief she seeks. If that error was "harmless" and Munyenyezi was not prejudiced, her conviction under 18 U.S.C. § 1425(a) must stand.

IV. The Erroneous Instruction on "Materiality" was Harmless.

First, and perhaps most fundamentally, the erroneous jury instruction about which Munyenyezi complains was not a "structural error" that would require automatic reversal of her

conviction. That is, the error did not render her trial "fundamentally unfair," as the Supreme Court has defined that phrase.

> We have recognized that most constitutional errors can be harmless. If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis. Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a very limited class of cases [listed examples omitted].
>
> The error at issue here - a jury instruction that omits an element of the offense - differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process, and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair.
>
> Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

Neder v. United States, 527 U.S. 1, 8-9 (1999) (punctuation and citations omitted) (emphasis supplied).

The question presented, then, is whether the error at issue requires correction. It does not. The lack of a complete instruction on "materiality" consistent with the Court's opinion in Maslenjak was "harmless" insofar as it is clear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). See also Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the record as a whole, that the constitutional error was harmless beyond a reasonable doubt."). Cf. Fry v. Pliler, 551 U.S. 112, 116 (2007) (holding that on collateral (habeas) review of a state court conviction, the proper standard by which to assess constitutional error is the more lenient one articulated in Brecht v. Abrahamson, 507 U.S. 619 (1993) - that is, whether the error "had substantial and injurious effect or influence in determining the jury's verdict" - and not Chapman's more demanding "harmless beyond a reasonable doubt" standard).

Count One of the indictment charged Munyenyezi with having made at least five specific, material, false statements on her Application for Naturalization, Form N-400. And, the jury was instructed that, before it could convict Munyenyezi of the crime charged in Count One, each juror must agree that she made at

least one particular false statement. "By that I mean the following: it is not sufficient if you all agree that the defendant made some false statement, but cannot agree on which one. Instead, before you may convict the defendant of the crime charged in count one, you must all agree with regard to which specific false statement(s) the government has proved beyond a reasonable doubt." Jury Instructions (document no. 110) at 20.

The jury returned a general verdict. Nevertheless, it is undeniable that the jury unanimously concluded, beyond a reasonable doubt, that Munyenyezi made at least one of the false statements identified in the indictment - that is:

> Question one: Munyenyezi lied when she denied membership in, or association with, any association, foundation, or party and failed to disclose her membership in, or association with, the MRND and Interahamwe;
>
> Question two: Munyenyezi lied when she denied having ever persecuted any person because of race, religion, national origin, or membership in a particular group and failed to disclose her direct and indirect persecution of Tutsis during the Rwandan genocide;
>
> Question three: Munyenyezi lied when she denied having ever committed a crime and failed to disclose her participation in genocide, murder, rape, and kidnapping;
>
> Question four: Munyenyezi lied when she denied having ever given false or misleading information to any U.S. official while applying for any immigration benefit and failed to disclose her prior lies on, among other documents, the Rwandan Questionnaire; and/or

> Question five: Munyenyezi lied when she denied having ever lied to any U.S. official to gain entry or admission into the United States and failed to disclose her prior lies on, among other documents, the Rwandan Questionnaire.

Given the evidence introduced at trial, as well as the findings the jury necessarily had to have made, it is plain that the now incomplete instruction on "materiality" was harmless beyond a reasonable doubt. Had Munyenyezi answered either question two or question three truthfully - that is, had she acknowledged her persecution of Tutsis and/or revealed her role in genocide, murder, rape, and kidnapping - she would have immediately been deemed ineligible for naturalization. See, e.g., Testimony of Donald Heflin, Trial Transcript, Day 6 (document no. 285) at 14 ("The Immigration and Nationality Act says you can't come to the U.S. if you've committed a crime of moral turpitude, section 212(a)(2). Crimes of moral turpitude include murder or aiding and abetting in murder."). See generally Maslenjak, 137 S. Ct. at 1928-29 ("If the facts the defendant misrepresented are themselves disqualifying, the jury can make quick work of that inquiry. In such a case, there is an obvious causal link between the defendant's lie and her procurement of citizenship. . . . In short, when the defendant misrepresents facts that the law deems incompatible with

citizenship, her lie must have played a role in her naturalization.").

Alternatively, if Munyenyezi had answered questions one, four, and/or five truthfully and disclosed her association with the MRND and Interahamwe, as well as her earlier lies on, among other forms, the Rwandan Questionnaire, the government would have, without a doubt, undertaken further investigation that "would predictably have disclosed some legal disqualification," Maslenjak, 137 S. Ct. at 1929 - that is, Munyenyezi's participation in the genocide, her role in the MRND and the operation of the roadblock, and her role in the persecution, rape, and execution of Tutsis. See, e.g., Testimony of Donald Monica, Trial Transcript, Day 4 (document no. 301) at 13-14 (stating that if Munyenyezi had disclosed her membership in the MRND, he would have investigated that matter further); Testimony of Maurice Violo, Trial Transcript, Day 7 (document no. 292) at 57-59, 90 (testifying that if Munyenyezi had disclosed her membership in the MRND, "we would investigate exactly what that was and what her involvement in that organization was."); Testimony of Donald Heflin, Trial Transcript, Day 6 (document no. 285) at 30 (describing membership in the MRND and Interahamwe as a "red flag" that would have resulted in either immediate disqualification or, at a minimum, further

investigation into her role in the organization). See also Id. at 13 (noting that if a response prompted a yellow or red flag, "We would go back out and ask that more questions be asked, and in some cases we just simply wouldn't be able to issue the visa or the refugee travel documents. The burden is really on the applicant for a visa or refugee status in these cases. We have plenty of people who want to come to the U.S. We can just skip over people that have these kind of problems and take the next person in line.").

In short, then, even assuming the court's instruction on "materiality" fell short of explaining the heightened causality requirements recognized in Maslenjak, that error was, under the circumstances, harmless beyond a reasonable doubt. Had Munyenyezi truthfully answered any one of the five questions identified in the indictment, her application for naturalization would have been immediately denied or, at a minimum, further investigation into the nature of Munyenyezi's conduct during the genocide would have been conducted. Such an investigation would have inevitably led to the discovery of what the evidence overwhelmingly established - that Munyenyezi actively participated with the MRND and Interahamwe in perpetrating murder, rape, and kidnapping, as part of the Rwandan genocide.

Finally, the court notes that Munyenyezi did not contest making the (false) statements to immigration authorities, nor did she claim that those statements were immaterial to her eligibility for naturalization. Rather, she asserted that the witnesses against her were either lying or had mistaken her for some other (unidentified) woman who dressed in MRND attire, operated the roadblock outside of Munyenyezi's home, and participated in the genocide. Plainly, the jury rejected those claims. Consequently, the omitted element - a proper instruction on the materiality of the false statements charged - pertained to a matter that was both uncontested and established by proof beyond a reasonable doubt. See generally Neder, 527 U.S. at 17 ("In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.") (emphasis supplied); Johnson v. United States, 520 U.S. 461, 470 (1997) (noting that "evidence supporting materiality was overwhelming [and] materiality was essentially uncontroverted at trial," and stating that "On this record there is no basis for concluding that the error [failing to instruct the jury on "materiality"] seriously affected the fairness, integrity or public reputation of judicial proceedings. Indeed, it would be

the reversal of a conviction such as this which would have that effect. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.") (citations and internal punctuation omitted).

Because the court concludes that Munyenyezi's claim fails on the merits, it need not address the government's alternative arguments concerning procedural default and the (generally disfavored) concurrent sentence doctrine.

Conclusion

Petitioner's Motion to Vacate Sentence under 28 U.S.C. § 2255 (document no. 1, as amended by document no. 11) is denied.

The Clerk of Court shall enter judgment in accordance with this order and close the case.

Rule 11 Certificate

As the interplay between Kungys and Maslenjak is undeveloped, and resolution of this petition turns on both a construction and application of Maslenjak's causation rules as they inform "materiality," as well as an assessment of the weight of the evidence of guilt presented

at trial, I find that those issues arguably satisfy the petitioner's burden to make a substantial showing of the denial of a constitutional right (28 U.S.C. § 2253(c)(2)), and so warrant the issuance of a certificate of appealability with respect to those issues. See Rule 11, Rules Governing Section 2255 Proceedings.

SO ORDERED.

Steven J. McAuliffe
United States District Judge

October 10, 2019

cc: Richard Guerriero, Esq.
John A. Capin, AUSA
Mark Quinlivan, AUSA

United States Court of Appeals
For the First Circuit

No. 19-2041

BEATRICE MUNYENYEZI,

Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,

Respondent, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before

Thompson and Kayatta,
Circuit Judges.*

Richard Guerriero, with whom Lothstein Guerriero, PLLC, was on brief, for petitioner.

Mark T. Quinlivan, Special Assistant United States Attorney, with whom Scott W. Murray, United States Attorney, District of New Hampshire, and Andrew E. Lelling, United States Attorney, District of Massachusetts, were on brief, for respondent.

* Judge Torruella heard oral argument in this matter and participated in the semble, but he did not participate in the issuance of the panel's opinion in this case. The remaining two panelists therefore issued the opinion pursuant to 28 U.S.C. § 46(d).

March 3, 2021

KAYATTA, Circuit Judge. Petitioner Beatrice Munyenyezi was convicted of procuring naturalization based on false statements to immigration officials about her conduct during the Rwandan genocide, see 18 U.S.C. § 1425(a), and of procuring naturalization as an ineligible person, see id. § 1425(b). Six years ago, we affirmed her conviction and sentence. United States v. Munyenyezi, 781 F.3d 532 (1st Cir. 2015). Two years later, in Maslenjak v. United States, 137 S. Ct. 1918 (2017), the Supreme Court described the role that a falsehood need play in acquiring citizenship to prove a violation of section 1425(a). Pointing to differences between that description and the instructions given to the jury in her case, Munyenyezi seeks vacatur of her conviction through a petition for habeas corpus relief under 28 U.S.C. § 2255(a). Because Munyenyezi was not actually prejudiced by the instructions as given, we affirm the district court's denial of Munyenyezi's petition. Our reasoning follows.

I.

A detailed discussion of the background of this case, including Munyenyezi's trial, appears in our above-cited opinion affirming Munyenyezi's conviction and sentence on direct appeal. We summarize that background briefly to provide relevant context for our discussion in this post-conviction litigation.

This case arises out of the 1994 Rwandan genocide, during which members of Rwanda's majority ethnic group, the Hutus, killed

more than 700,000 Rwandans, mostly Tutsis, a minority ethnic group. The killing occurred at the behest of Rwanda's ruling party, the Hutu-dominated National Republican Movement for Democracy and Development ("MRND"). The MRND, led by President Juvénal Habyarimana, rose to power in 1973. President Habyarimana remained in office until his assassination on April 6, 1994, an event that brought Rwanda's long-running ethnic tensions to a head. MRND leaders seized on the president's death as an opportunity to demand violence against Tutsis. Members of the military, police, and the Interahamwe, the MRND's youth militia, responded by carrying out mass killings. Across Rwanda, local militias constructed roadblocks where they checked passing Rwandans' identification cards to determine their ethnicity. The militias detained Tutsis and then abused, tortured, and killed them. The campaign to eliminate Tutsis continued until July 1994.

On April 19, 1994, a speech by Rwanda's new president to officials of the southern Rwandan city of Butare prompted a systematic effort to hunt Tutsis in Butare using patrols and roadblocks. One of those deadly roadblocks was on Butare's main road in front of the Hotel Ihuriro.

The Hotel Ihuriro was home during the genocide for Petitioner Beatrice Munyenyezi, her husband, and their young child. Several facts about the occupants of the Hotel Ihuriro are uncontested: Munyenyezi's husband, Shalom Ntahobali, was the son

of the hotel's owners. Shalom's mother, Pauline Nyiramasuhuko, was an MRND cabinet minister. His father, Maurice Ntahobali, was a former politician and the head of the National University in Butare. Shalom himself led Butare's Interahamwe militia, which supervised the roadblock in front of the Hotel Ihuriro, and he developed a reputation as a brutal murderer.

The dispute between the government and Munyenyezi centers on what Munyenyezi herself did during the genocide and whether she honestly described those actions to immigration officials. Between 1995 and 2003, Munyenyezi successively and successfully sought status as a refugee, which required a special "Visa 6" security clearance; as a lawful permanent resident; and then as a naturalized citizen of the United States. During this lengthy march to citizenship, she submitted to formal interviews and completed various application forms, including a questionnaire specifically tailored for applicants who had been in Rwanda since April 1, 1994 ("the Rwandan Questionnaire") and an application for naturalization known as Form N-400.

Several years after her naturalization, Munyenyezi drew the attention of United States officials when she testified on her husband's behalf at an international criminal court, claiming that there was no roadblock near her family's hotel and that her husband was not involved in the genocide. Munyenyezi, 781 F.3d at 536.

After an investigation, the government concluded that Munyenyezi made the following five false statements on her Form N-400:

> One, in response to a question on her Form N-400 that asks, ["]have you ever . . . been a member of or associated with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place,["] . . . [Munyenyezi] did not disclose her membership in and association with the MRND and Interahamwe, and she responded by putting an "X" in the box marked ["]no[."]
>
> Two, in response to a question on her N-400 that asked, ["]have you ever persecuted, either directly or indirectly, any person because of race, religion, national origin, membership in a particular social group or political opinion,["] . . . [Munyenyezi] responded by putting an "X" in the box marked "no" and failed to disclose her direct and indirect persecution of Tutsis during the Rwandan genocide.
>
> Three, in response to a question on her N-400 that asked, ["]have you ever committed a crime or offense for which you were not arrested,["] . . . [Munyenyezi] failed to disclose her participation in genocide, murder, rape, kidnapping, and theft, and responded by putting an "X" in the box marked "no." The government also alleges that [Munyenyezi] failed to disclose that she had previously violated United States criminal laws by providing false information in immigration interviews and documents, that is, the Form I-590, Form G-646, the Rwandan questionnaire, and Form I-485.
>
> Four, in response to a question on her Form N-400 that asked, ["]have you ever given false or misleading information to any U.S. official while applying for any immigration benefit or to prevent deportation, exclusion, or removal,["] . . . [Munyenyezi] responded by

> putting an "X" in the box marked "no" and failed to disclose false information she provided in previous [i]mmigration documents, that is, the Form I-590, Form G-646, the Rwandan questionnaire, and Form I-485.
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> Five, in response to a question on her N-400 that asked, ["]have you ever lied to any U.S. Government official to gain entry or admission into the United States,["] . . . [Munyenyezi] responded by putting an "X" in the box marked "no" and failed to disclose the false information she provided on the Form I-590, Form G-646, and the Rwandan questionnaire.

A federal grand jury indicted Munyenyezi. In count one, the government alleged that Munyenyezi violated section 1425(a) when she "knowingly procure[d] . . . her own naturalization contrary to law . . . by knowingly providing false and fraudulent information as to material facts in her . . . Form N-400." See 18 U.S.C. § 1425(a). In count two, the government alleged that Munyenyezi was "not entitled" to naturalization because -- among other reasons -- she gave materially false information during the immigration process and that she violated section 1425(b) by nevertheless "knowingly procur[ing] . . . [her] naturalization." See id. § 1425(b).

The first jury to consider the evidence deadlocked, necessitating a mistrial. Munyenyezi's retrial ended in her conviction on both counts.

Numerous Rwandan witnesses testified during the government's case-in-chief. At least four eyewitnesses testified

that they saw Munyenyezi decked out in the MRND's distinctively colored clothing, checking IDs and culling out Tutsis at the roadblock. Munyenyezi, 781 F.3d at 537. One of those eyewitnesses reported that Munyenyezi gave orders to have several Tutsis killed. Id.

Several immigration officials testified about how statements disclosing this activity would have affected Munyenyezi's various applications in her pursuit of eventual naturalization. That testimony established that naturalization would probably have been denied if she had admitted to participating in persecution, to committing a crime such as kidnapping for which she had not been arrested, or to helping the Interahamwe check identification cards at the roadblock. Government witnesses also explained how knowledge of MRND membership would have cast serious doubt on her receipt of a Visa 6 security clearance and would have at least led to much more inquiry that may well have resulted in a denial of her applications.

Following closing arguments, the trial judge instructed the jury that the "government must prove each of the following essential elements beyond a reasonable doubt" to establish a violation of section 1425(a): "First, that the defendant procured or attempted to procure United States citizenship. And second, that it was contrary to the law for the defendant to procure such citizenship. And third, that the defendant knowingly and

intentionally provided materially false statements on her Application for Naturalization, Form N-400."

The judge next explained that "[t]he government alleges that the defendant procured United States citizenship [']contrary to law['] because it claims she violated federal law which makes it unlawful to give false material statements in connection with procuring or attempting to procure immigration and naturalization benefits."

The judge then explained to the jury that to find that Munyenyezi violated section 1425(a), it had to "agree with regard to which specific false statement or statements the government has proved beyond a reasonable doubt" out of the five statements listed above. And to find that the government proved the falsity of statements four and five, the judge instructed that the jury had to "agree as to at least one prior material false statement." On appeal, both parties presume that the phrase "prior material false statement" refers only to a false statement about the conduct covered by statements one, two, or three.

The trial judge told the jury that a statement is "material" if

> it has a natural tendency to influence or to be capable of influencing the decision of the decisionmaker to which it was addressed. So, in this case, a statement is "material" if the statement had a natural tendency to influence, or was capable of influencing, the decision of a government agency in making a determination

> required to be made. The government need not show that the agency was actually influenced by the statement involved. If a statement could have provoked governmental action, it is material regardless of whether the agency actually relied upon it.

After this court affirmed Munyenyezi's conviction and sentence, she filed a timely habeas petition pursuant to 28 U.S.C. § 2255(a) seeking relief on several grounds. Her petition was pending when the Supreme Court held in Maslenjak v. United States, 137 S. Ct. 1918 (2017), that the government must show "that an illegality played some role in [the] acquisition" of citizenship to prove a violation of section 1425(a). Id. at 1925. With the district court's permission, Munyenyezi added a claim to her section 2255 petition challenging the materiality instruction based on Maslenjak.

The district court rejected the claims raised in her initial section 2255 petition but did not address her Maslenjak claim. Munyenyezi obtained a certificate of appealability from this court as to the Maslenjak claim alone. After we remanded to allow the district court to address the claim in the first instance, the district court denied Munyenyezi's petition, reasoning that any error in the jury instructions was harmless beyond a reasonable doubt. Munyenyezi then filed this timely appeal.

II.

To prevail on the claim for relief under 28 U.S.C. § 2255(a), Munyenyezi need show that her sentence "was imposed in violation of the Constitution or laws of the United States" or "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Munyenyezi did not raise at trial the argument now advanced in her post-conviction request for relief. So, to rule in her favor, we would need to find not only that there was error in her trial, but also that there was "cause" not to have objected to the error and that "'actual prejudice' result[ed] from the error[]." United States v. Frady, 456 U.S. 152, 167-68 (1982). As did the district court, we put to one side the "cause" requirement -- and the government's arguments on that issue and others -- to go right to the question of whether, assuming error, there was actual prejudice as a result of that error.

To ascertain prejudice, we first examine the precise nature of the error said to have caused actual prejudice. Munyenyezi directs our attention to the jury instruction concerning the required relationship between a lie and the grant of citizenship. Drawing on the notion of materiality, the trial judge told the jurors that, in order to support a conviction, a false statement must have "a natural tendency to influence, or [be] capable of influencing, the decision" of an immigration officer. The judge further explained that it is enough if the

statement "could have provoked governmental action"; it need not have "actually" done so.

Munyenyezi argues that that instruction was error because it did not comport with what the Supreme Court subsequently required in Maslenjak to show that a defendant "knowingly procure[d] . . . , contrary to law, the naturalization of any person." 18 U.S.C. § 1425(a). In Maslenjak, the trial court instructed the jury that it could convict based on a finding that the defendant lied in procuring naturalization even if the lie was not "material" and "did not influence the decision to approve [her] naturalization." 137 S. Ct. at 1924 (alteration in original). After the Sixth Circuit affirmed the conviction, see United States v. Maslenjak, 821 F.3d 675 (6th Cir. 2016), the Supreme Court granted certiorari. It then vacated the Sixth Circuit's decision, finding the instruction dispensing with any materiality requirement improper. Maslenjak, 137 S. Ct. at 1924. In so finding, the Supreme Court established what at first blush may seem like a causation-in-fact requirement regarding the relationship between an illegal act and naturalization. The Court several times explained that an illegality must have "played some role in" the acquisition of naturalization, id. at 1923, 1925, 1927; that it "must have somehow contributed to the obtaining of citizenship," id. at 1925; and that "a jury must decide . . . whether a false statement sufficiently altered [the immigration]

processes as to have influenced an award of citizenship," id. at 1928.

When homing in on section 1425(a)'s application to lies to government officials, however, the Court made clear that the government need not prove that a lie did in fact cause, contribute to, or influence the award of citizenship. Rather, retreating from notions of causation-in-fact, the Court explained that jurors need not focus on the actual decisionmaker in the immigration proceeding at issue. Indeed, "the question of what any individual decisionmaker might have done with accurate information is beside the point." Id. Instead, "the proper causal inquiry under § 1425(a) is framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law." Id. And in making those decisions, the jury can consider whether a truthful response "would have prompted reasonable officials . . . to undertake further investigation" that "'would predictably have disclosed' some legal disqualification." Id. at 1929 (quoting Kungys v. United States, 485 U.S. 759, 774 (1988)).

The difference between what Maslenjak requires and the instruction given in this case is subtle but substantive. Reduced to its nub, Maslenjak requires proof that the truth would have predictably led a reasonable official to deny the application,

while the instruction here required that the government prove that the truth could have had such an effect.

We will assume that this difference means the given instruction was erroneous. As we have stated, we are also assuming without deciding that there was due "cause" not to have challenged the instruction at trial. So the pivotal question is whether the error resulted in "actual prejudice." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting United States v. Lane, 474 U.S. 438, 449 (1986)).

Courts have tinkered with the words used to describe exactly how one must ascertain "actual prejudice." Brecht pointed to the formulation set forth in the Supreme Court's earlier decision in Kotteakos: "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Kotteakos itself also stated that an error can be overlooked as not causing actual prejudice if the reviewing court "is sure that the error did not influence the jury, or had but very slight effect." Kotteakos, 328 U.S. at 764. Our circuit in 1994 reasoned that under Brecht no actual prejudice is shown "if it is 'highly probable' that the challenged action did not affect the judgment." Singleton v. United States, 26 F.3d 233, 237 (1st Cir. 1994) (quoting United States v. Wood, 924 F.2d 388, 402 (1st Cir. 1991)) (applying Brecht to a section 2255 petition).

A year later, the Supreme Court spoke of not having "grave doubt" because one is convinced beyond "equipoise" that the error had not "substantially influenced the jury's decision." O'Neal v. McAninch, 513 U.S. 432, 435–36 (1995). And while we thereafter continued to apply the Singleton formulation, see, e.g., Sustache-Rivera v. United States, 221 F.3d 8, 18 (1st Cir. 2000),[1] the Supreme Court has more recently pointed us towards O'Neal's formulation of the pertinent inquiry, see Davis v. Ayala, 576 U.S. 257, 268, 276 (2015). That inquiry as formulated in O'Neal begins by asking, "Do I, the judge, think that the error substantially influenced the jury's decision?" 513 U.S. at 436. If the answer to that question is "yes," or if we are in "equipoise as to" the answer, then the error is not harmless. Id. at 435.[2]

With this inquiry in mind, we turn to Munyenyezi's argument that there is much reason to think that the "could have caused" (rather than "would have caused") instruction substantially influenced the jury's decision. Munyenyezi contends that we must consider this harmless error argument de novo in reviewing the district court's denial of her habeas challenge to

[1] The government asks us to do so again here.

[2] We reject Munyenyezi's argument that we should apply a "beyond a reasonable doubt" test for harmlessness, as we might were this a review of a preserved claim of error on direct review. See Chapman v. California, 386 U.S. 18, 24 (1967); see also United States v. Maslenjak, 943 F.3d 782, 787 (6th Cir. 2019).

her federal conviction, citing Pettiway v. Vose, 100 F.3d 198, 200 (1st Cir. 1996) ("Our review of a harmless error determination on habeas corpus review is de novo."). The government offers no objection or argument to the contrary, so we shall proceed with de novo review.

Munyenyezi begins her argument by pointing out that the jury's general verdict did not specify which of the challenged statements it found to be false. Building on this ambiguity, Munyenyezi constructs a two-part, "but-for" scenario that would warrant habeas relief. First, she describes the jury's verdict as likely resting on a finding that Munyenyezi's only false statement was her denial of MRND membership. In so arguing, she implicitly acknowledges that statements two[3] and three,[4] and part of one,[5] if false, would have obviously concealed information that would have led to the denial of her various applications during the naturalization process. And she presumes, as does the government,

[3] In her second statement, Munyenyezi denied that she had "ever persecuted, either directly or indirectly, any person."

[4] In her third statement, Munyenyezi denied that she had "ever committed a crime or offense for which [she was] not arrested."

[5] By swearing that she had never "been a member of or associated with any organization, association, fund, foundation, party, club, society or similar group," Munyenyezi not only denied MRND membership but also Interahamwe membership in her first statement.

that statements four[6] and five[7] could only be found to be false based on a prior material false statement about activity addressed in statements one, two, or three. Second, she predicts that a differently instructed jury would have found that a lie limited to denying MRND membership would not have played a role in her successful pursuit of naturalization; i.e., learning of MRND membership would not have caused reasonable officials to deny her application or to undertake an investigation that predictably would have led to its denial. Because we find unconvincing her description of the likely basis for the guilty verdict, Munyenyezi's argument fails at the first step.

Munyenyezi's description of the likely basis of the jury's actual verdict cannot be squared with the trial record, which reflects that the contest of proof and argument trained overwhelmingly on two diametrically opposed, all-or-nothing versions of Munyenyezi's conduct in Rwanda. The government's witnesses testified that Munyenyezi was virtually all-in on the genocide: She joined the MRND, wore its clothing, joined the Interahamwe, and actually checked identity cards at the roadblock

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[6] In her fourth statement, Munyenyezi denied that she had "ever given false or misleading information to any U.S. official while applying for any immigration benefit or to prevent deportation, exclusion, or removal."

[7] In her fifth statement, Munyenyezi denied that she had "ever lied to any U.S. Government official to gain entry or admission into the United States."

to find Tutsi victims to be separated out for murder. Munyenyezi's defense was an across-the-board denial and a claim that those witnesses were lying. She put on expert testimony suggesting that Rwandan witnesses tend to adhere to an "official narrative" promoted by their government. Munyenyezi also called several witnesses who spent time at the Hotel Ihuriro during the genocide. According to them, Munyenyezi was always in the hotel caring for her young child, and she wore loose-fitting maternity clothes, not military fatigues or MRND clothing, because she was pregnant with twins who were born on November 20, 1994 (more than seven months after the genocide began).

The closing arguments reflect the all-or-nothing nature of the case as presented to the jury. According to Munyenyezi's counsel, the Rwandan genocide was an event "in which she had absolutely no part." Moreover, Munyenyezi's counsel insisted that "[s]he wasn't a member of the MRND" and that the witnesses who said otherwise were "just wrong" and were "not telling the truth." The government, in turn, stressed that Munyenyezi lied about essentially everything to cover up her past. The all-or-nothing approach by both sides was virtually compelled by the nature of the evidence, which presented no readily apparent means for concluding that the government witnesses were lying about everything except MRND membership.

Munyenyezi nevertheless points to the government's statement in its closing argument that if "she told a single lie," she was guilty, and that "at a minimum she associated with the MRND." This was an invitation to the jurors, claims Munyenyezi, to find against her only on her denial of MRND membership and a recognition by the government that its proof was not as strong on the other issues. But in arguing that that lie was enough to convict, the government never suggested that there was any path in the record to find that that statement was false and the others true. And even if the government's strongest claim was that Munyenyezi lied about MRND membership, the fact remains that the evidence pointing to across-the-board lying was strong unless one labeled the government's witnesses as liars and Munyenyezi and her witnesses as honest.

The district court characterized the record at the second trial as "overwhelmingly establish[ing]" her participation in murder. And on her direct appeal we described the record as presenting a "vast and damning array of evidence against her." Munyenyezi, 781 F.3d at 540 (holding that any error in admitting into evidence Munyenyezi's international criminal court testimony was harmless). On such a record, it is quite a stretch to think that the jury found that she and her witnesses at trial lied only by falsely denying her MRND membership yet told the truth otherwise. The jury more likely viewed a lie about MRND membership

as the thirteenth stroke of Thomas Hardy's crazy clock: "It was not only received with utter incredulity as regarded itself, but threw a doubt on all assurances that had preceded it." Thomas Hardy, Far From the Madding Crowd 209-10 (First Vintage Classics ed. 2015).[8] For these reasons, we reject as implausible the premise that Munyenyezi's conviction turned on a finding that she lied only about her MRND membership. And with that premise rejected, and causation inexorable as to the other alleged lies, we find ourselves far past equipoise in answering "no" to the question of whether the assumed Maslenjak error in the instruction substantially influenced the jury's decision. See O'Neal, 513 U.S. at 435-36.[9]

III.

For the foregoing reasons, we affirm the denial of Munyenyezi's petition for a writ of habeas corpus.

[8] With thanks to Dwight H. Sullivan & Eugene R. Fidell, Winding (Back) the Crazy Clock, 19 Green Bag 2d 397, 401 (2016).

[9] Because we agree with the government that Munyenyezi has failed to show actual prejudice, we decline to address the government's alternative argument that the concurrent sentence doctrine bars habeas relief here.