No. _____

SUPREME COURT OF THE UNITED STATES

BEATRICE MUNYENYEZI
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This court has never decided which harmless error standard applies to a habeas corpus challenge under 28 U.S.C. §2255. Some courts have used the *Chapman* standard which puts the burden on the government to show that the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Most courts have used the less strict, more government-friendly, *Brecht* standard, also used in §2254 cases, which asks whether the error had a "substantial and injurious effect" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993). Nevertheless, in just March of this year, one court of appeals wrote:

> To date the Supreme Court has not addressed whether *Chapman*, *Brecht*, or a third standard applies to federal prisoners seeking post-conviction relief under 28 U.S.C. §2255. Neither has our court taken a position on the issue and indeed "our caselaw gestures in conflicting directions."

Ruiz v. United States, 990 F.3d 1025, 1031 (7th Cir. 2021) (citation omitted).

Petitioner Munyenyezi stands convicted of federal crimes despite her jury not having been instructed on an essential element of the crimes charged. The correct instruction was not given because the case requiring it, *Maslenjak v. United States*, 137 S.Ct. 1918 (2017), was not decided until after Munyenyezi's conviction and appeal were final. When the district court denied Munyenyezi's §2255 claim, she appealed. Although the district court had used the *Chapman* standard, the First Circuit Court of Appeals rejected that standard and applied a version of the more lenient *Brecht* test. The First Circuit applied that deferential test even though Munyenyezi's claim had not been, and could not have been, heard previously. This

court should grant Munyenyezi's petition, address the important unresolved issue of how to measure harmless error under §2255, and then hold that the correct standard in this context is whether the error was "harmless beyond a reasonable doubt," as set forth in *Chapman*.

The Question Presented is: When reviewing a habeas corpus claim under 28 U.S.C. §2255, where the court is considering for the first time whether an erroneous jury instruction on an essential element was harmless, does the court apply the *Chapman* "harmless beyond a reasonable doubt" standard, the "substantial and injurious effect" *Brecht* standard, or some other measure of harmless error?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Beatrice Munyenyezi, respectfully requests a writ of certiorari to review the judgement of the United States Court of Appeals for the First Circuit.

PROCEEDINGS IN THE LOWER COURTS

Munyenyezi was convicted of two criminal charges in the United States District Court for the District of New Hampshire. *United States v. Munyenyezi*, No. 10-cr-00085. The United States Court of Appeals for the First Circuit affirmed those convictions. *United States v. Munyenyezi*, 781 F.3d 532 (1st Cir. 2015). The district denied Munyenyezi's subsequent motion under 28 U.S.C. §2255 to vacate the convictions. *Munyenyezi v. United States*, No. 16-cv-00402, App. 1-20.[1] The court of appeals affirmed that district court order. *Munyenyezi v. United States,* 989 F.3d 161 (1st Cir. 2021). App. 21-40.

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on March 3, 2021. Petitioner did not seek a rehearing. This petition is timely filed according to this court's rules and the orders of March 19, 2020 and July 19, 2021. This court has jurisdiction under 28 U.S.C. 1254(1).

[1] Citations to the appendix of this petition are in the form of "App." followed by the page number. Citations to the appendix filed in the First Circuit Court of Appeal in *Munyenyezi v. United States*, No. 19-2041, are in the form of "CA App." followed by the page number.

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law."

RELEVANT STATUTORY PROVISIONS

18 U.S.C. §1425 provides in relevant part:

> (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or
>
> (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing—
>
> Shall be fined under this title or imprisoned ….

28 U.S.C. §2255 provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

Introduction and Overview

Beatrice Munyenyezi immigrated to the United States from Rwanda and became a naturalized United States citizen. In 2010, the government indicted her for unlawfully procuring citizenship, in violation of 18 U.S.C. §1425(a) and (b), by lying during the naturalization process about her alleged role in the 1994 genocide in Rwanda. App. 1, 5-6. Munyenyezi's first trial ended with a hung jury. App. 27. She was retried and convicted in 2013. *Id.* Her convictions were affirmed on appeal in 2015. *Munyenyezi*, 781 F.3d 532.

Two years after Munyenyezi's convictions were affirmed, this court decided *Maslenjak v. United States*, 137 S.Ct. 1918 (2017), holding that to convict a person of procuring citizenship by means of a false statement, in violation of 18 U.S.C. §1425(a), the government must prove a causal influence between the alleged false statement and the granting of citizenship. *Id.* at 1927. Since Munyenyezi's jury had been instructed that a causal connection and actual influence were not required, CA App. 1805, she asked the district court to vacate her convictions under 28 U.S.C. §2255. CA App. 1971, 2028-2031.

The district court held that, if the jury instruction was erroneous in light of *Maslenjak*, the erroneous instruction was nonetheless harmless error. App. 13. The district court relied on the harmless error standard of "harmless beyond a reasonable doubt" in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Id.* The district court expressly rejected the "more lenient" standard from *Brecht v. Abrahamson*,

507 U.S. 619, 637-38 (1993), which requires a petitioner to show that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.*

Munyenyezi appealed to the Court of Appeals for the First Circuit, which affirmed the district court decision but in doing so rejected the *Chapman* standard. *Munyenyezi*, 989 F.3d at 168, n. 2. After acknowledging the uncertainty regarding the test for prejudice in §2255 cases, the First Circuit applied a less demanding standard based on *Brecht* and *O'Neal v. McAninch*, 513 U.S. 432 (1995). *Id.,* 989 F.3d at 168. Using that standard, the First Circuit answered "'no' to the question of whether the assumed *Maslenjak* error in the instruction substantially influenced the jury's decision." *Munyenyezi*, 989 F.3d at 170.

Munyenyezi now seeks review by this court because the unanswered question of how to measure harmless error in the §2255 context led the court of appeals to apply the wrong standard. She is entitled to review according to the correct standard: the *Chapman* "harmless beyond a reasonable doubt" test. She summarizes the evidence and her reasonable doubt argument to show that it would have mattered if the First Circuit had applied the correct standard.

The Government Accused Munyenyezi of Lying About Whether She Participated in the Rwandan Genocide in 1994.

Munyenyezi was charged in an eighteen-page two-count indictment with violating 18 U.S.C. §1425(a) and §1425(b). CA App. 50-67. Paragraphs 1 – 5 of the indictment described the history of conflict between the Hutu and the Tutsi in Rwanda and the events leading up to the 1994 genocide during which many Tutsis and moderate Hutus were murdered by Hutu extremists. CA App. 50-52.

Paragraphs 6 – 10 of the indictment stated that Munyenyezi was a Hutu affiliated with the MRND political party in Rwanda in 1994, that she was married to Arsene Shalom Ntahobari ("Shalom") who was also in the MRND, that they were both in the Interahamwe youth militia, that between April and July of 1994, she lived at the Ihuriro Hotel in Butare, and that she participated in killings, rapes, kidnappings, and other crimes against Tutsis at a roadblock in front of the Ihuriro Hotel. CA App. 52-54.

Paragraphs 11 – 17 detailed how Munyenyezi allegedly lied about or failed to disclose her background and crimes when she later immigrated to the United States. CA App. 54-60. The Government alleged that Munyenyezi made false statements about her background and prior conduct throughout the process, from her application for refugee status, to her application for permanent residence, to her application to become a naturalized citizen. *Id.*

Against this factual background, the indictment then charged the two counts. CA App. 62-67.

Count One charged that Munyenyezi procured her naturalization as a citizen "contrary to law" when she violated various federal statutes, such as 18 U.S.C. 1001, "by knowingly providing false and fraudulent information as to material facts in her Application for Naturalization, Form N-400." CA App. 62.

Count Two charged that Munyenyezi procured naturalization and citizenship "to which she was not entitled." CA App. 63-65. Subparts a, b, and c of Count Two, alleged that Munyenyezi was not entitled to naturalization because she provided

"false and fraudulent information as to material facts" on her applications for naturalization, for refugee status, and for permanent residence. CA App. 63-64. Subparts d, f, and g, of Count Two, alleged that Munyenyezi was not entitled to become a citizen under 8 U.S.C. 1427 because she had participated in genocide, she was not of good moral character, and because she was not otherwise entitled to naturalization according to the requirements of the statute. CA App. 64-65. Subpart e of Count Two combined the "false statements" and the "not entitled to" concepts by alleging that Munyenyezi could not satisfy the requirement of being a person of good moral character because she provided false testimony during the immigration process. CA App. 64.

Thus, the indictment alleged false statements as the predominant basis for both the "contrary to law" theory of Count One, under 18 U.S.C. §1425(a), and the "not entitled thereto" theory of Count Two, under 18 U.S.C. §1425(b).

The Evidence at Trial Focused on Munyenyezi's Alleged False Statements.

At trial, the government presented testimony from 16 witnesses. The defense presented 7 witnesses. The witnesses fell into three general groups: witnesses who provided background about Rwanda and the 1994 genocide; witnesses who either supported (for the government) or countered (for the defense) the claim that Munyenyezi participated in the Rwandan genocide; and, witnesses who testified about the immigration process and, in particular, Munyenyezi's naturalization and false statements she allegedly made during that process.

Witnesses Who Provided Background About Rwanda and the Genocide.

Dr. Rony Zachariah testified for the government about the many horrors he witnessed while working for Doctors Without Borders in Rwanda during the 1994 genocide. CA App. 161-162, 212-239. Despite these disturbing accounts, Zachariah's only testimony directly relevant to the case against Munyenyezi was that there was a roadblock near the Ihuriro Hotel where other witnesses would say Munyenyezi was living. CA App. 220. Zachariah openly admitted on cross-examination that he had never heard of Munyenyezi before she was charged and he had no information that suggested she participated in the horrors he described. CA App. 247-48.

Similarly, Dr. Timothy Longman, an expert witness, gave a detailed historical account of the genocide. CA 526-633. Although he provided information about Munyenyezi's husband, Shalom, he also testified that he never heard that Shalom was married and never heard the name "Beatrice Munyenyezi" during his research. CA App. 684-85. Nonetheless, the government was allowed to introduce evidence through Longman that Munyenyezi said in testimony before the International Criminal Tribunal on Rwanda (the "ICTR") that she attended MRND related rallies in 1991 or 1992, several years before the genocide. CA App. 658, 662.

The defense also called an expert witness, Dr. Brian Endless. He testified that Hutus and Tutsis were killed in almost equal numbers, CA App. 1515, and that many Hutus were massacred at refugee camps. CA App. 1520-22. He also described a cultural phenomenon whereby Rwandans often talk about events in first person

even when they did not personally witness the event or otherwise have any firsthand knowledge of the event they are describing. CA App. 1539-40.

Witnesses Who Supported or Countered the Claim that Munyenyezi Participated in the Genocide.

The government presented a number of witnesses in support of the claim that Munyenyezi participated in murders and other crimes against Tutsis.

Several of the witnesses gave testimony largely limited to the claim that they saw Munyenyezi wearing MRND clothing. Thierry Sebaganwa testified that Munyenyezi was involved in the MRND political party and wore MRND clothing. CA App. 281-85, 290. Bruno Nzeyimana testified he saw a woman at the roadblock who was addressed on one occasion as "Beatrice" but he did not know her otherwise. CA App. 350-52, 368-69. Consolee Mukeshimana said that Munyenyezi wore a military uniform to a family funeral and that she also saw Munyenyezi at the roadblock wearing a military uniform.

Vestine Nyiraminani, a Tutsi, testified that Shalom and his family, including Munyenyezi, lived at the Ihuriro Hotel. CA App. 487-88, 494. She said the Munyenyezi asked for her ID card at the roadblock then sent her to sit with other Tutsis. CA App. 492-95. Soldiers then brought Nyiraminani and others to the forest about ten minutes away from the Ihuriro. CA App. 497-99. A soldier stabbed her sister in the head but Nyiraminani managed to escape. CA App. 499. Despite her supposed identification of Munyenyezi, on cross-examination, Nyiraminani testified that she never saw Munyenyezi pregnant. CA App. 514. However, numerous other witnesses testified that Munyenyezi was visibly pregnant during April and June of

1994 (noted below) (the First Circuit even noted the pregnancy in its opinion, 781 F.3d at 582).

Jean Paul Rutaganda, who was 15 in 1994, said he saw Munyenyezi at the roadblock wearing an Interahamwe uniform, checking IDs, and counting and registering dead Tutsis. CA App. 753-54. However, he admitted that he was hiding in a building some distance away at the time when he claimed to have been able to identify Munyenyezi and see the details of what she was doing. CA App. 768. He also admitted that he had not mentioned Munyenyezi during an earlier investigation, even though he had talked about Shalom and others. CA App. 770-72.

Vincent Sibomana also testified for the government. CA App. 1122. During the genocide, he was 14 years old. CA App. 1124. He said he saw Munyenyezi wearing MRND clothing when she came into the soda shop where he worked. CA App. 1128-29. He testified that he also saw Munyenyezi at the Ihuriro roadblock checking IDs. CA App. 1131. He tried to escape Butare because of the killing, however, he was stopped at the roadblock. CA App. 1138. He said Munyenyezi asked for his ID. *Id.* He was hit with the butt of a gun and he fell into a ditch. *Id.* There were other people, Tutsis, in the ditch with him. CA App. 1139-40. He said that Munyenyezi said the people in the ditch should be killed. CA App. 1140. At that point, he was able to flee and avoid being killed. CA App. *Id.*

The government's last witness in its case-in-chief was Thomas Brian Andersen, special agent for the Department of Homeland Security. During his testimony, the government introduced additional evidence that Munyenyezi told the

ICTR that neither she nor her husband were involved in violence during the genocide. CA App. 1211.

The defense called witnesses to rebut the claims that Munyenyezi participated in the genocide and other crimes. The defense witnesses said they never saw Munyenyezi wearing a uniform and that she was pregnant. Several said the hotel was a place of refuge and that Munyenyezi helped some Tutsis.

Gilbert Hitimana was a Tutsi from Butare. CA App. 1305. He explained that when the genocide started, many of his family members were murdered. CA App. 1309. With the help of a relative, he found refuge at the Ihuriro Hotel. CA App. 1309-12. During the month he was there, he saw Munyenyezi every day but never saw her wearing an MRND uniform. CA App. 1312-15. Munyenyezi was always at the hotel with a baby and was in the late stages of pregnancy. CA App. 1328. When he eventually fled the hotel, he traveled with Munyenyezi. CA App. 1315.

Venantie Nyiramariro also described the hotel as a place of refuge and said she herself arrived there as a refugee in May 1994. CA App. 1414. She saw Munyenyezi at the hotel but never wearing MRND clothes. CA App. 1415-18. Nyiramariro described Munyenyezi as pregnant and taking care of a small baby. *Id.*

Venerande Uwiteyakazana, a Hutu, found out her Tutsi ten-year-old son was going to be killed and so she also fled to the Ihuriro. Munyenyezi was there with a baby and was pregnant, but never wore any military style clothes. CA App. 1372-78.

Venuste Habinshuti, a cook at the hotel, said Munyenyezi was pregnant at the time and was wearing maternity clothes, not a military uniform. CA App. 1392-

1400. Likewise, Marie Alice Ahishakiye, another cook at the hotel, said she never saw Munyenyezi wearing any kind of uniform and that Munyenyezi would wear loose skirts because she was pregnant. CA App. 1333-35, 1243.

Witnesses Who Testified About the Immigration Process and Allegedly False Statements Munyenyezi Made During that Process.

Donald Monica was associate director at the United States Citizenship and Immigration Service. CA App. 370. He worked for that agency, or its predecessor for over 30 years, and worked all around the world. CA App. 370-72. He described the process of becoming a refugee. CA App. 371-74. In 1995, while working in Nairobi, he adjudicated Munyenyezi's application for refugee status. CA App. 380. He said that applicants for refugee status must have a well-founded fear of persecution. CA App. 377, 382. He described "fear of persecution" as a fairly low standard. CA App. 382. The applicant must meet criteria for one out of five grounds. CA App. 382. If the applicant engaged in persecution, they were barred from refugee status. CA App. 383. Munyenyezi's application read, "In July 1994 there was a violent change of the government in Rwanda. Given the extent of the killing that took place before and after the takeover, many people fled the country and are up to date unwilling to go back so long as the security situation does not improve. I happen to be among those people." CA App. 383. There was also a question about the applicant's membership in political, professional, or social organizations. Munyenyezi answered "none." CA App. 399.

Monica testified that the fact that Munyenyezi was a Hutu would not have automatically raised suspicions for him. CA App. 432. Regarding her response that

she was not affiliated with any political, professional, or social organizations, he said that if she had written "MRND," he would have asked more questions, but he did not say that such an answer would have been an automatic disqualification. CA App. 401. He explained that an answer of "MRND" could have been related to either the risk of an applicant being persecuted or grounds to exclude an applicant involved in persecuting others. CA App. 400-01, 433-34. He was not asked and did not say that, if Munyenyezi had written "MRND" on her application, her answer would have predictably led to disqualifying grounds.

Notably, Munyenyezi acknowledged on her application that Shalom was her husband CA App. 408. Although she later asked that Shalom be removed from her application because he had decided to not join her and the children in the United States, she did not deny her relationship to him. CA App. 411.

Donald Heflin was the managing director of the visa office at the United States State Department. CA App. 860-61. Heflin previously served as the desk officer for Rwanda in the State Department's Bureau of African Affairs. CA App. 861-62. He testified that an applicant who stated they had been a member of MRND would have been asked more questions. CA App. 885. He said the answer was "a yellow flag, perhaps a red flag." CA App. 884. However, he was inconsistent as to whether such an answer was only a "yellow flag," CA App. 898, or whether it would be a bar to admission. CA App. 885. He also said that "the MRND had some people in it that never participated in the genocide." CA App. 887.

Maurice Violo testified that he was an immigration services officer in 2003 who adjudicated Munyenyezi's application for naturalization. CA App. 980-81. Regarding questions during that process about political affiliations, he noted that Munyenyezi did not list any. CA App. 993. He said that if Munyenyezi had described being affiliated with MRND, he would have investigated further. App 994-95. When asked directly, "had she written MRND, she would have been excluded?" he said "no . . . We would investigate . . . . No final decision would have been made at that time." CA App. 1026.

The District Court Did Not Give the Instruction Required by Maslenjak and Did Not Require the Jury to Specify Which Statement It Found to Be False.

After the close of evidence and closing arguments, the district court instructed the jury on the two counts in the indictment. CA App. 1785-1886.

Regarding Count 1, the court explained the allegation that Munyenyezi procured citizenship contrary to law was based on alleged false statements during the naturalization process. According to the government, Munyenyezi lied when:

1. She denied or failed to disclose membership in MRND;
2. She denied or failed to disclose being involved in the persecution of Tutsis;
3. She denied or failed to disclose having participated in genocide, murder, and other crimes;
4. She gave false information to United States immigration officials; and
5. She denied ever having lied to an immigration official.

CA App. 1799-1804 (the alleged lies are summarized here, not quoted in full). The court told the jury that, in order to convict, it had to find that Munyenyezi's false statements were "material." CA App. 1805. However, the court also told the jury

that it need only find that the false statements had "a natural tendency to influence or be capable of influencing the decision maker" and that "the government need not show that the agency was actually influenced by the statement involved." *Id.* In other words, the court did not instruct the jury that it was required to find that the false statements played some role in the decision to grant Munyenyezi citizenship. The court also told the jury that it had to be unanimous as to which statement or statements it found to be false, CA App. 1804-05, but did not instruct the jury to identify those statements in a special verdict form, as discussed below.

Regarding Count Two, the court told the jurors they had to be unanimous regarding the specific disqualifying ground which caused them to find that Munyenyezi was not entitled to become a citizen, but the court did not require the jurors to identify that ground or grounds. CA App. 1814. In addition, the court told the jury it had two alternative routes to find that Munyenyezi was not entitled to become a citizen because she lacked good moral character. The court said that either participating in genocide or making "material false statements for the purpose of obtaining immigration" would qualify as failing to be of good moral character. CA App. 1813. Similar to the instruction on Count One, the court said the jurors had to be unanimous as to the specific ground, but here again did not require jurors to identify that ground. CA App. 1814. Although the court referred to a "material false statement," the court did not specifically refer back to the definition offered with regard to Count One or reinstruct the jury on materiality. Lastly, when telling the jurors that a verdict on §1425(b) could be based on a

material false statement, the court did not require the jurors to find that the false statement played some role in granting Munyenyezi citizenship.

The government was offered, but declined, the opportunity for a special verdict form which would have clarified the basis for a decision to convict. CA App. 1784-85.

Munyenyezi's Convictions Were Affirmed on Appeal Before Maslenjak Was Decided.

The jury convicted Munyenyezi on both counts. CA App. 1887-1893. Although the court instructed the jury that it must be unanimous as to the specific false statements it found regarding §1425(a), nothing in the record shows which alleged false statement or statements formed the basis of the jury verdict since only a general verdict form was used. Similarly, there is no way to know whether the §1425(b) verdict was based on the allegations of false statements or on Munyenyezi procuring citizenship when she did not meet other requirements.

The district court sentenced Munyenyezi to two concurrent 120-month sentences. CA App. 1949-50; *Munyenyezi*, 781 F.3d at 536. The district court also revoked her citizenship. CA App. 1891, 1894. The convictions were affirmed on direct appeal in 2015. *Munyenyezi*, 781 F.3d 532.

As detailed above, after *Maslenjak* was decided in 2017, Munyenyezi sought relief under 28 U.S.C. §2255, with the result that the district court denying relief under the *Chapman* standard but the court of appeals rejecting that standard and instead denying relief under the *Brecht* standard.

REASONS FOR GRANTING THE WRIT

The court should grant this writ because it presents an important question which this court has not resolved, which the lower courts have not resolved, which arises regularly, and which was decided incorrectly by the First Circuit. When a previously reviewed state court conviction is challenged under 28 U.S.C. §2254, principles of federalism, comity, and finality make the *Brecht* "substantial and injurious effect" standard an appropriate measure of harmless error. However, when a petitioner like Munyenyezi presents a first-time §2255 challenge to a federal conviction, those principles are inapposite. In this context, the court should ask whether the failure to instruct the jury on an essential element was "harmless beyond a reasonable doubt," as set forth in *Chapman*.

The Courts of Appeals Have Given Conflicting Answers to the Question Left Open by this Court.

When addressing the harmless error standard applicable to §2254 claims, this court has pointedly left open the question of which standard applies to §2255 claims. *See Fry v. Pliler*, 551 U.S. 112, 120-21 (2007). The court specifically limited its review to resolving the conflict among the courts of appeal regarding harmless error analysis under §2254, as illustrated by *Bains v. Cambra*, 204 F.3d 964, 976-977 (9th Cir. 2000), and *Orndorff v. Lockhart*, 998 F.2d 1426, 1429-1430 (8th Cir.1993). *Fry*, 551 U.S. at 120.

In just March of this year, the Seventh Circuit noted that the issue remains open and a source of conflict:

> To date the Supreme Court has not addressed whether *Chapman*, *Brecht*, or a third standard applies to federal prisoners seeking post-conviction relief under 28 U.S.C. §2255. Neither has our court taken a position on the issue and indeed "our caselaw gestures in conflicting directions."

Ruiz v. United States, 990 F.3d 1025, 1031 (7th Cir. 2021) (citation omitted). In the Seventh Circuit, the court has applied both the *Chapman* and the *Brecht* standards. *See Daniels v. United States*, 939 F.3d 898, 903 (7th Cir. 2019) noting both *Lanier v. United States*, 220 F.3d 833, 839 (7th Cir. 2000) (which applied a harmless-error test resembling the *Chapman* formulation), and *Sorich v. United States*, 709 F.3d 670, 674 (7th Cir. 2013) (which used the *Brecht* standard to evaluate constitutional error in jury instructions).

The issue also appears to be unresolved in the Third Circuit. *See Adams v. United States*, 570 F. App'x 126, 129 n.1 (3d Cir. 2014) (noting that the *Brecht* standard is applied in the §2254 context and "nearly every other" circuit applies Brecht to §2255 claims, but finding no error under either standard in the instant case); *see also Bledsoe v. United States*, No. 2:07-cr-00165, 2020 U.S. Dist. LEXIS 117473, at *23 (E.D. Pa. July 6, 2020) ("neither the Third Circuit nor the Supreme Court has, to date, determined whether the *Brecht* standard is applicable to federal habeas proceedings under 28 U.S.C. § 2255").

Other courts of appeal have used the *Brecht* standard for §2255 cases. *See Santana-Madera v. United States*, 260 F.3d 133, 140 (2d Cir. 2001) (finding an erroneous jury instruction harmless under either *Brecht* or the *Chapman* but

stating that "generally" the *Brecht* standard applies); *United States v. Smith*, 723 F.3d 510, 517 (4th Cir. 2013) (concluding that "the *Brecht* standard of review for harmlessness is better suited to §2255 cases than the *Chapman* standard); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000) (applying *Brecht* and requiring the §2255 petitioner to show that the jury instructions "as a whole, were so infirm that they rendered the entire trial fundamentally unfair"); *United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) (per curiam) ("We hold now that *Brecht's* harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254."); *United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006) ("[W]e hold that the *Brecht* standard applies when conducting a harmless-error review of a §2255 petitioner's claim that the jury in his or her trial" was instructed in error); *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002) (per curiam) ("In this Circuit, we apply the *Brecht* harmless error standard to the habeas review of federal court convictions, as well as state court convictions.").

The Justifications for Following Brecht Instead of Chapman Fail in Cases Like Munyenyezi's.

Despite the majority view, some courts have declined, for good reason, to apply the more lenient *Brecht* test to a §2255 claim which has not been reviewed previously by any court. *See Monsanto v. United States*, 143 F. Supp. 2d 273, 285 (S.D.N.Y. 2001) ("[T]his Court finds that the rationales identified in *Brecht* for applying a less onerous harmless error standard on collateral review do not justify the application of that standard in a §2255 proceeding where there had been no *Chapman* analysis on direct review."); *Romero v. United States*, 00 Civ. 3513 (RPP),

91 Cr. 586 (RPP), 2001 U.S. Dist. LEXIS 11747, at *20-23 (S.D.N.Y. Aug. 14, 2001) (agreeing with *Monsanto*).

Brecht adopted a less strict test for §2254 claims because of concerns regarding finality of decisions, comity, federalism, and preserving the sanctity of the trial process. *See Brecht*, 507 U.S. at 633-355. However, in the context of a §2255 claim, comity and federalism have no application at all. Moreover, in a case like Munyenyezi's, where there was not and could not have been any prior review of the claim by any court, finality can hardly be a factor. Lastly, the concern about the sanctity of the trial process is a limited justification for preserving a verdict after a trial in which the jury was not instructed on an essential element of the crimes charged. After all, that is an error which this court has otherwise subjected to the *Chapman* "harmless beyond a reasonable doubt test" *see Neder v. United States*, 527 U.S. 1, 4 (1999), and which Justice Scalia would have found to be a structural error. *Id.* at 30 ("I believe that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged -- which necessarily means his commission of every element of the crime charged -- can never be harmless.").

Following the Chapman Rather than the Brecht Standard Will Make a Difference in Munyenyezi's Case Because There Is a Reasonable Doubt as to Whether the Failure to Give The Maslenjak Instruction Affected the Verdicts.

As noted above, after *Maslenjak* was decided in 2017, Munyenyezi moved to vacate her convictions under 28 U.S.C. §2255. Munyenyezi argued that when a

defendant is charged with procuring citizenship contrary to law, as provided in 18 U.S.C. §1425(a):

> [T]he Government must establish that an illegal act by the defendant played some role in her acquisition of citizenship. When the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result.

Maslenjak, 137 S.Ct. at 1923. In other words, the "issue a jury must decide . . . is whether a false statement sufficiently altered those [naturalization] processes as to have influenced an award of citizenship." *Id.*, 137 S.Ct. at 1928.

Munyenyezi acknowledged *Maslenjak's* holding that, "even if the true facts lying behind a false statement would not 'in and of themselves justify a denial of citizenship,' they could have 'led to discovery of other facts which would do so." *Id.* (quoting from *Chaunt v. United States*, 364 U.S. 350, 352-53 (1960). She explained that this court relied in its earlier split decision in *Kungys v. United States*, 485 U.S. 759, 774-77 (1988), to elaborate on the practical operation of the required causal link when the false statement does not misrepresent facts which are per se disqualifying but which would have led to further investigation. In that situation, the Government must make a two-part showing. *Id.* at 1929. First, "the Government has to prove that 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." *Id.* (*quoting from Kungys* 485 U.S. at 774, n. 9). That showing alone is not enough, however. The Government must then also show that

"the investigation 'would predictably have disclosed' some legal disqualification." *Id.* (*quoting from Kungys* 485 U.S. at 774).

That final requirement in *Maslenjak* regarding false statements which would have led to further investigation is the source of the reasonable doubt about whether the correct jury instruction would have made a difference in Munyenyezi's case. The district court erred in finding harmless error because the record does not establish, beyond a reasonable doubt, that truthful answers from Munyenyezi would have predictably disclosed facts which would have disqualified her from citizenship. As presented to the jury in the district court's instruction, CA App. 1799-1804, and as set forth in the district court's order, App. 14-15, there were five alleged false statements on which the jury could have based its verdicts.

Two of the alleged false statements were that Munyenyezi failed to admit her participation in persecution of Tutsis and her commission of crimes such as the murder of Tutsis. However, these were not the government's strongest claims. As detailed above, the defense challenged the government's case by attacking the credibility of the government witnesses and by presenting defense witnesses who contradicted the government witnesses. For example, Gilbert Hitimana was a Tutsi who took refuge at the Ihuriro Hotel after his family was murdered. CA App. 1305-1312. Contrary to the government's account, he never saw Munyenyezi wearing MRND attire. CA App. 1314-15. He attributed no violence to her, instead describing her as caring for a baby and being pregnant. CA App. 1328. When he eventually fled the hotel, Hitimana, a Tutsi, traveled with Munyenyezi. CA App. 1315. He did not

describe any attempts by her to harm him, contrary to the allegations of government witnesses that Munyenyezi was part of the violence against Tutsis. The testimony of Mary Alice Ahishakiye, Venerande Uwiteyakazana, Venuste Habinshuti, and Venantie Nyiramariro, supported similar conclusions.

The government's stronger case, and the more likely basis for the verdicts, was that Munyenyezi lied about having been associated with MRND. That is the most likely lie found by the jury because it was the least extreme of the government allegations and it would have been the easiest for the jury to accept. The jury had even heard admissions from Munyenyezi that, some years before the genocide, she had attended MRND rallies. CA App. 658. Not surprisingly, the government heavily emphasized MRND association and focused on Munyenyezi's denial of any such political affiliation. In closing, counsel for the government said, "[T]here can be no reasonable doubt that she in fact was a member of the MRND or at a minimum closely associated and affiliated with the MRND . . . . [T]he evidence has been abundant that at a minimum she associated with the MRND. . . . That's a false statement that matters. She's guilty -- if this answer is false she's guilty." CA App. 1688-98. In short, by saying, "at a minimum we proved this one," the government recognized that lying about MRND association was the false statement the jury was most likely to find proved.

The problem with that most likely theory is that it fails the *Maslenjak* requirement that the lie must conceal a truth which would have "predictably disclosed" grounds for disqualification. The government never made that

connection. To the contrary, its witnesses stopped at the point of saying they would have investigated further. The witnesses did not detail what information would have developed, at the time of the false statements, if such investigation had been conducted.

Donald Monica testified that, if Munyenyezi had written "MRND" on her application, he would have asked more questions. CA App. 400-01. However, he also testified that the answer would not be automatically disqualifying. CA App. 400-01, 433-34. He did not testify that the answer would have predictably disclosed disqualifying information or describe such information.

Donald Heflin gave inconsistent testimony on the issue. He said he would have asked more questions if Munyenyezi had acknowledged an MRND association. CA App. 885. At some points he did seem to be saying that such an answer would be disqualifying and a "red flag," but he also said maybe it was only a "yellow flag." CA App. 884. Most significantly with regard to the requirement of whether a truthful answer would have predictably disclosed disqualifying information, he admitted that "the MRND had some people in it that never participated in genocide." CA App. 887.

Thus, the government did not show what further information Monica, Heflin, or any other official would have predictably discovered. The government did not establish that those officials would have found the witnesses the government found to testify at the trial in 2013, or any other witnesses who would have given similar information. Perhaps the investigating officials would have found the defense

witnesses instead and concluded that Munyenyezi's MRND association was benign. In the absence of such evidence, it cannot be said that the government proved a causal link between the false statement most likely identified by the jury and the predictable disclosure of information which would have disqualified Munyenyezi from citizenship. Certainly, the government cannot show beyond a reasonable doubt that the jury would have found such a causal link based on the evidence presented.

CONCLUSION

The First Circuit reached the wrong conclusion because it applied the *Brecht* standard instead of the *Chapman* standard. Rather than asking if the government could carry its burden of showing that there was no reasonable doubt about whether the erroneous jury instruction affected the verdict, the court used a test which denied Munyenyezi relief unless she showed that the erroneous instruction had a substantial and injurious effect on the verdict. The use of the wrong standard inappropriately put the burden on Munyenyezi and skewed the court's evaluation of the evidence. In other words, the court was looking for proof from Munyenyezi that the verdict likely would have been different when the court should have been requiring the government to show that there was no reasonable possibility that the correct jury instruction would have resulted in a different verdict. Finally, this happened in a case where the first trial resulted in a hung jury, a fairly strong sign that reasonable people might well have had different views of the evidence.

For all of the foregoing reasons, Munyenyezi respectfully requests that the Court grant her petition for a writ of certiorari.

Date: August 2, 2021

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP OF SUPREME COURT BAR

I, Richard Guerriero, certify that I am a member of the Supreme Court Bar, Bar No. 177863, since 1988.

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SUPREME COURT OF THE UNITED STATES

BEATRICE MUNYENYEZI
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

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