2/6/2019

NO.: 18-1433

IN THE

SUPREME COURT OF THE UNITED STATES

MILTON BALKANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

MILTON BALKANY
5402 15th Avenue
Brooklyn, N.Y., 11219

QUESTIONS FOR REVIEW

In *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454 (1991), the Supreme Court held that if a criminal defendant fails to raise a claim at a time when it otherwise should have been raised, and "if he cannot show cause, the failure to earlier raise the claim may nonetheless be excused if he can show that a fundamental miscarriage of justice—the conviction of an innocent person—would result from a failure to entertain the claim." *McCleskey*, 499 U.S. 478-497. In petitioner's case, the district court refused to address the merits of his ineffective assistance of counsel claims raised in a postconviction motion dealing with petitioner's actual innocence to overcome any alleged procedural default. Does this Court's holding in *McCleskey*—when applied in the context of *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed. 2d 272 (2012) (procedural default will not bar a federal court from hearing substantial claim of ineffective assistance at trial if default results from ineffective assistance of the prisoner's counsel in the collateral proceeding) and *Trevino v. Thaler*, 569 U.S. 413, 133 S.Ct. 1911, 1921, 185 L.Ed. 2d 1044 (2013) (clarifying

that the *Martinez* exception applies whether a claim could have been but was not raised earlier)—allow a lower court(s) to apply a default rule, or ignore petitioner's reliance on this Court's precedents, in failing to address the merits of what this Court has regarded as a miscarriage of justice resulting into the conviction of one who is actually innocent of the crime?

II. In *Brecht v. Abraham*, 507 U.S. 619 (1993), and *Rose v. Clark*, 487 U.S. 70 (1986), the Supreme Court held that "a defective reasonable doubt jury instruction infects the entire trial process and necessarily renders a trial fundamentally unfair" and thus "subject to automatic reversal of the conviction[s]." See *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Additionally, this Court held that "a jury instruction which equated reasonable doubt with a grave uncertainty and an actual substantial doubt," and stated that what was required was a "moral certainty that the defendant was guilty, suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard" in violation of

the Fifth Amendment Due Process Clause. See *Cage v. Louisiana*, 498 U.S. 39 (1990). In this case, each of the trial, appellate, and postconviction counsels failed to raise the defective reasonable doubt jury instruction which is clearly in the record. Did the Court err in affirming the District Court's summary denial, without addressing the merits or granting relief, of petitioner's coram nobis ineffective assistance of trial, appellate, and/or postconviction counsel claims for failing to raise the *structural error* reasonable doubt jury instruction claim?

III. This Court, in *In re Winship*, 397 U.S. 358 (1970), held that "in every criminal case the government must each and *every element* of a charged offense beyond a reasonable doubt" before he/she may be convicted, under the Due Process Clause, as a matter of law. Moreover, in *Richardson v. United States*, 526 U.S. 813 (1999), this Court reasoned and held that "[a] jury in a [criminal] case must unanimously agree not only that the defendant committed some ... violations, but also about which specific "violations" make up that [crime]." Pp. 817-824. In this case, the jury

charge instructed the jurors not only on the specific elements upon which they must find, beyond a reasonable doubt, before the petitioner may be found guilty, but also informed the jurors that their verdict *must be unanimous as to the same theory of guilt.* However, the jury failed to follow the trial court's mandatory instruction regarding the unanimity provision of the "same theory of guilt" which effectively resulted into the jury not finding each and every element of the charged offense "beyond a reasonable doubt," and, as such, the jury failed to render a verdict at all under the Due Process Clause. Did the Court of Appeals err in affirming the trial court's summary denial of petitioner's ineffective assistance claims, without reaching the merits, where the jury verdict clearly failed to render any verdict under the Fifth Amendment Due Process Clause ("Due Process Clause")?

INTERESTED PARTIES

The Honorable Denise Cote, United States District (trial) Judge for the Southern District of New York.

The Honorable Judges of the Second Circuit Court of Appeals' panel, New York, New York; Hon. Judges Amalya L. Kearse; Hon. John M. Walker, Jr.; and Hon. Gerard E. Lynch; and en banc panel.

United States Attorney (Preet Bharara) for the Southern District of New York and AUSA Marc P. Berger.

Benjamin Brafman, trial attorney, of Brafman & Associates, 767 3rd Avenue, #26, N.Y., N.Y., 10017

Stillman, Friedman, & Shechtman, P.C., appellate counsel, 425 Park Avenue, N.Y., N.Y., 10022.

Jeremy Gutman, 233 Broadway, Suite 2707, N.Y., N.Y., 10279, postconviction counsel.

Rabbi Milton Balkany, petitioner.

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I. The Court should determine, or clarify, whether failure to raise issues earlier, in a direct appeal or § 2255 motion, may be excused under this Court's holding that "if the default results from the ineffective assistance of the prisoner's counsel in the *collateral* proceeding" the "equitable qualification" of *Coleman [v. Thompson* Rule, 501 U.S. 722 (1991)] "will not bar a federal habeas court from hearing a substantial claim of ineffective

assistance," or under the miscarriage of justice doctrine—actual innocence—as held in *McCleskey v. Zant*, where a lower court applies an abuse of discretion doctrine.

II. The Court should determine, or clarify, whether a *structural error*—such as a defective reasonable doubt jury instruction—not raised by trial, appellate, and/or postconviction counsel, applying the "equitable qualification" of the *Coleman's* Rule, constitutes "sound reasons" to excuse the failure to raise the claim earlier, so as to permit the district court to address the merits of the claim.

III. The Court should determine, or clarify, whether failure of trial, appellate, and/or postconviction counsel constitutes "sound reasons" to excuse the failure to the claim earlier that the jury's verdict failed to demonstrate a finding of guilt on each element of the charged offense under *In re Winship* and the Fifth Amendment of the United States Constitution's Due Process Clause.

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No. _____

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MILTON BALKANY
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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Milton Balkany respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, rendered and entered in the Case Number 17-3995 in that court on

October 4, 2018, in *Balkany v. United States* (**App. 20-30**), which affirmed the judgment of the United States District Court for the Southern District of New York.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Second Circuit's Order denying the petition for Rehearing and Rehearing en banc (**App. 31**).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the Rule of the Supreme Court of the United States. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances, and regulations:

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia,

when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district, wherein the crime shall have been committed, which district s hall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Procedural History

Petitioner Milton Balkany, on May 20, 2010, was charged in a four-count federal indictment with Counts (1) Extortion, in violation of 18 U.S.C. § 875(d); (2) Wire Fraud in violation of 18 U.S.C. § 1343; (3) Blackmail in violation of 18 U.S.C. § 873; and (4) False Statements in violation of 18 U.S.C. § 1001. (**App. 32-42**) A jury trial commenced on November 1, 2010 before the Honorable Denise Cote, and the petitioner was convicted on all counts. On February 18, 2011, petitioner was sentenced, principally, to 48 months' imprisonment. (**App. 43-46**).

Balkany timely appealed his convictions, which were affirmed by Summary Order on March 19, 2012. *United States v. Balkany*, 468 F. App'x 49 (2d Cir. 2012). On December 6, 2012, Balkany, through retained counsel, filed a habeas corpus petition under 28 U.S.C. § 2255. The petition was denied, as untimely, on March 27, 2013 in a decision which also denied a certificate of appealability. See *Balkany v.*

United States, No. 12cv8884 (DLC), 2013 WL 1234950 (S.D.N.Y. Mar. 27, 2013). On February 11, 2014, the Court of Appeals denied a motion for certificate of appealability and dismissed the appeal. (See Case No. 13-2011, 2d Cir.)

On November 11, 2017, Balkany filed a petition for Writ of Error Coram Nobis in the district court after his supervised release ended on August 11, 2017. The district court, on November 29, 2017, denied the writ, without addressing any of the issues, *on the merits*, save for Balkany's request for the judge to recuse herself from residing over the coram nobis petition, for which the judge ultimately denied. (**App. 12-19**). Balkany timely appealed the decision to the Court of Appeals for the Second Circuit, Case No. 17-3995, in which that court, on October 4, 2018, affirmed the district court's decision. (**App. 20-30**). Balkany timely filed for a Rehearing and Rehearing En banc, in which the Court of Appeals denied and on November 26, 2018. (**App. 31**). This petition follows and is timely.

Facts. At the outset of Balkany's coram nobis petition, from the "applicable laws" to the "reasons to

grant the petition" and throughout the petition itself, Balkany clearly outlined that all of his claims were being presented under the doctrine of "ineffective assistance of counsel." Germane to Balkany's claims was his argument that his conduct was purely innocent. In other words, Balkany argued that he was, in fact, "*actually innocent*" of the crimes of conviction. There, Balkany demonstrated, from the trial record, that the government, through its agent—a former Assistant U.S. Attorney—informed Balkany that his conduct, which is the result of the instant convictions, was "*100 % not criminal.*" As a result of counsel's failure, despite acknowledging this on the record, to pursue the only available line of defense, but rather, informed the court that he "ha[d] no defense" for Balkany, constituted ineffective assistance of counsel. Under *McCleskey*, Balkany meets the exception under the fundamental miscarriage of justice doctrine.

Secondly, Balkany demonstrated, in his coram nobis, that the conduct of the district court in giving the jury instruction on "Reasonable Doubt" was *structural error*, under this Court's precedents, *Cage*

v. Louisiana, 498 U.S. 39 (1990), calling for *per se* reversal of the convictions without any showing of prejudice.

Thirdly, Balkany demonstrated that counsel was ineffective by failing to raise the issue regarding the verdict failing to find, beyond a reasonable doubt, every element of the charged offense where the judge instructed the jury on the elements its must, unanimously, agree on before they may find Balkany guilty, but for which the verdict form unequivocally failed to do under *In re Winship* and the Due Process Clause of the United States Constitution.

Fourthly, and final, without waiving any issues but not wishing to argue issues the Court may need not entertain in light of the issues and facts stated above and shown below, Balkany demonstrated, based on the Second Circuit's own recent precedents, as well as this Court's longstanding precedents, that the "sound reasons" for not raising the coram nobis issues earlier are based upon this Court's "exceptions" to the rule of law that such claims be presented earlier; i.e., Balkany's "actual innocence" and "fundamental miscarriage of justice" claim

(*McCleskey v. Zant*), as well as the Second Circuit's extension of the coram nobis to "include Sixth Amendment ineffective assistance of counsel" claims. *Kovacs v. United States*, 744 F. 3d 44 (2d Cir. 2014); and *Chhabra v. United States*, 720 F. 3d 395, 406 (2d Cir. 2013).

Thereafter, the district court, *without addressing the merits* of Balkany's claims, including actual innocence, defective reasonable doubt jury instruction, and defective verdict for failing to find guilt beyond a reasonable doubt of *every element* of the charged offense, denied Balkany's petition on the alleged basis that Balkany "failed to show sound reasons for not raising the claims earlier," and the court of appeals affirmed the lower court's decision on the same basis in violation of this Court's precedents.

REASONS FOR GRANTING THE WRIT

This case presents questions of exceptional and potentially recurring national importance. First is the question whether, and to what extent, a district court and/or an appellate court may apply an "abuse of discretion," or any other standard of review to defeat this Court's

"exceptions" to the miscarriage of justice doctrine regarding actual innocence, structural error, and guilt beyond a reasonable doubt of every element of the charged offense. That is, under the equitable qualification of the *Coleman* Rule—that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if the default results from the ineffective assistance of the prisoner's counsel in a collateral proceeding," as stated in *Martinez v. Ryan*, 566 U.S. 1, (2012), whether a court may circumvent this Court's decision by applying any standard of review which tends to provide the court an *option* of whether or *not* to address the merits of the claims or to dismiss the petition without addressing the merits which, itself, calls into question this Court's longstanding precedents in *McCleskey* and *Martinez*, among others.

Secondly, is the question whether, and to what extent, a district court may decline to address the merits of an error this Court has determined to be Structural Error subject to an *automatic reversal of the convictions* without any showing of prejudice and

one not subject to harmless error under *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Thirdly, is the question whether, and to what extent, a district court may revert to the "sound reasons" doctrine, under *Martinez v. Ryan*, supra, to decline/refuse to address the merits of a substantial ineffective assistance of counsel claim in which the jury's verdict unequivocally fails to demonstrate a finding of guilt on each essential element of the offense in violation of the Due Process Clause, the Sixth Amendment, and *In re Winship*, 397 U.S. 358 (1970).

ARGUMENT ONE

COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S SUMMARY DENIAL OF PETITIONER'S CORAM NOBIS UNDER THE SOUND REASONS DOCTRINE CONTRARY TO THIS COURT'S EXCEPTIONS IN *COLEMAN V. THOMPSON*, *MARTINEZ V. RYAN*, AND *McCLESKEY V. ZANT*

In this case, because the district court refused to address the merits of Balkany's claims of ineffective

assistance of counsel, including counsel in the collateral proceeding, in addition to the district court denying the coram nobis without requiring the government to respond to the petition, any assertion by the Court of Appeals that it reviewed and rejected Balkany's claims on the merits, without briefing any issues, defies any due process rights to his opportunity to respond, or to Balkany's right to be heard.

At the trial level and on direct appeal of his convictions, Balkany asserted his claim of being "*actually innocent*" of the charged offenses. This claim carried over to Balkany's coram nobis petition as he argued counsel was ineffective each at trial, on appeal, and in the collateral proceeding. The district court determined, and the court of appeals affirmed, "that Balkany failed to provide sound reasons for his delay in seeking relief earlier" and that Balkany's issues "could have been raised either on direct appeal (decided in 2012) or in his § 2255 motion (decided in 2013)." (**See App. 24**).

I. CAUSE TO EXCUSE PROCEDURAL DEFAULT

McCleskey v. Zant, 499 U.S. 467 (1991). Assuming, for argument's sake, that Balkany's reason(s) for failing to assert his claims earlier were not adequate for the district court to address the alleged defaulted claims, this Court has held that a person in Balkany's position: "[I]f he cannot show cause [for the failure earlier to raise the defaulted claims], the failure to earlier raise the claim may nonetheless be excused if he can show that a fundamental miscarriage of justice—the conviction of an innocent person—would result from a failure of the Court to entertain the claim." *McCleskey*, 499 U.S. at 478-497. Under *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed. 2d 640 (1991), this Court held that "attorney error committed in the course of a state postconviction proceeding—for which the Constitution does not guarantee the right to counsel—cannot supply cause to excuse a procedural default that occurs in those proceedings." Id., at 499 U.S. 775, 111 S.Ct. at 2546. However, in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed. 2d 272 (2012), this Court announced an "equitable ... qualification" of the *Coleman's* rule stating that: "[A]

procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial ***if the default results from the ineffective assistance of the prisoner's counsel in the collateral proceeding."*** *Martinez*, 566 U.S. at 17, 132 S.Ct. 1309.

II. ACTUAL INNOCENCE

Balkany's fundamental miscarriage of justice claim arises from his actual innocence in the context of the government's actions at the outset of this case. As mentioned at trial by Balkany's defense attorney, but not pursued nor appealed or challenged in the collateral proceeding, the government, in attempting to build a case against Balkany crossed the line and specifically informed Balkany that his conduct, in so far as the charges in this case goes, "wasn't criminal." At trial and without comment or opposition from the government, defense counsel, in response to the trial court's assertion that she "did not see that Balkany had carried his burden to ascertain an entrapment jury instruction," stated that:

"A person can get an entrapment charge even if it is [him] who went to initiate the contact, especially when, as in this case... **Klotz [former U.S. Attorney and government agent] told [Balkany what he was doing]** ***wasn't criminal***, at least in so far as the charges in this case." **(Tr. R. at 899-900) (See App. 48)** This action arose in regards to Balkany asking the, then unknown, government agent whether his, Balkany's, conduct "[was] perfectly 100 percent legal," to which the government's agent assured Balkany, prior to any alleged wrongdoing, that "everything [is] proper," meaning to Balkany that he was doing nothing illegal. (Tr. R. 577)

While ignorance of the law is no defense to criminal conduct, this Court recognized a narrow exception to this rule where an accused relies on information from an official state or government actor, and acts in accordance with that information. This exception is referred to as "entrapment by estopple," "reasonable reliance," or "good faith reliance on a state or government actor's advice." This Court has discussed the constitutionality of this defense in *Raley v. Ohio*, 360 U.S. 423 (1959), and *Cox*

v. Louisiana, 379 U.S. 536 (1965). In these decisions, this Court recognized that "individuals should not be prosecuted for engaging in conduct specifically authorized through government advice." To rely on this defense, an accused must essentially show that the legality of the conduct was officially authorized by a government agent, (2) the accused relied on this acknowledgment, (3) the reliance was reasonable, and (4) given the reliance, prosecution would be unfair. This conduct has been held to violate the Due Process Clause of the Fifth Amendment. *Raley v. Ohio*, and *Cox v. Louisiana*, supra; *United States v. Hedges*, 912 F. 2d 1397 (11th Cir. 1990); and *United States v. Tallmadge*, 829 F. 2d 767, 773 (9th Cir. 1987). Because prosecution, under the Due Process Clause, is *prohibited* by this Court's decisions, in an *entrapment by estopple* case, actual and factual innocence are inherently embodied within the parameters of this defense. Because the evidence demonstrates that the government's agent (former U.S. Attorney Klotz) informed Balkany that his "conduct wasn't criminal," without

argument Balkany certainly is innocent of any alleged criminal conduct.

Where, here, Balkany's collateral proceeding counsel, and the appellate counsel, failed to raise an ineffective assistance of trial counsel claim regarding Balkany's actual innocence under the entrapment *by estopple*—the default arising from appellate or collateral counsel—supplies the necessary "sound reasons" for failing to earlier raise the claims on direct appeal or in the § 2255 motion as determined by the district court and affirmed by the court of appeals contrary to this Court's decisions in *McCleskey*, supra.

Because Balkany, and those who may follow in his shoes, may be denied due process and subject to imprisonment of one actually innocent, this Court should hear and decide this case in favor of upholding its exceptions to the procedural default rule under the fundamental miscarriage of justice doctrine to protect the innocent who may otherwise be held accountable.

Balkany urges this Court to vacate the court of appeals' affirmance of the district court's failure/refusal to reach the merits of his substantial

ineffective assistance of counsel claims, and remand this case for a determination on the merits.

ARGUMENT TWO

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S SUMMARY DENIAL OF PETITIONER CORAM NOBIS CONTRARY TO THIS COURT'S DECISIONS IN *SULLIVAN V. LOUISIANA*, 508 U.S. 275 (1993), *BRECHT V. ABRAHAM*, 507 U.S. 619 (1993), AND *ROSE V. CLARK*, 478 U.S. 570 (1986) AS APPLIED TO *MARTINEZ V. RYAN*, 566 U.S. 1 (2012) WHERE THE COURT CONCLUDED THAT AN ERRONEOUS REASONABLE DOUBT JURY INSTRUCTION IS STRUCTURAL ERROR ALSO CONSTITUTING PER SE REVERSIBLE ERROR

Applying the *Martinez* rule, supra, that "a procedural default will not bar a federal habeas court from hearing a substantial ineffective assistance at trial if the default results from the ineffective

assistance of the prisoner's *counsel in the collateral proceeding*," the court of appeals' affirmance of the district court's denial of Balkany's coram nobis, without addressing the merits of a *structural error* committed at the trial level, threatens the fabrics of *stare decisis* and, again, calls into question the integrity of this Court's longstanding precedents.

At the trial court level, counsel for Balkany failed to provide the quality of representation under the Sixth Amendment to satisfy the guarantee of "*effective*" representation as defined by *Strickland v. Washington*, 466 U.S. 668 (1984). More importantly, however, after such error occurred, both appellate and postconviction counsels failed, miserably, to further protect the rights of Balkany against unconstitutional convictions. This Court has found an error as *structural* and, thus, subject to *automatic reversal of the conviction* where there is a *defective* reasonable doubt instruction. *Sullivan v. Louisiana*, supra. Here, the trial judge, without any objections from defense counsel while instructing the jury on the meaning of reasonable doubt, charged the jury, in clear violation of this Court's precedents, as follows:

"One final word on this subject. Reasonable doubt is not whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty, nor is it sympathy for the defendant. *After all, it is virtually impossible for a person to be absolutely and completely convinced of any* ***contested fact*** *that by its nature is* ***not subject to mathematical proof and certainty***." (**Tr. R. 1208**) (**See App. 50-51**).

In *Cage v. Louisiana*, 498 U.S. 39 (1990), this Court held that "a jury instruction which *equated* reasonable doubt with a grave uncertainty and an actual doubt," and stated that "what *was required in order to convict a defendant was a moral certainty*" that the defendant was guilty, suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard." The Court, then, reasoned that "when those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, a reasonable juror could have interpreted the instruction to allow a finding

of guilt based on a degree of proof below that which is required by the Due Process Clause." Id.

Because "[a] defective reasonable doubt instruction infects the entire trial process and necessarily renders a trial fundamentally unfair," *Brecht v. Abraham* and *Rose v. Clark*, supra, Balkany argues, respectfully, that the reasonable doubt instruction given in his trial was the *functional equivalent* of the instructions condemned by this Court in *Cage v. Louisiana* in regards to the "moral certainty" theory. That is, "proof of a *mathematical certainty*," as stated in Balkany's case, as opposed to a moral certainty, as stated in *Cage*, where the Court reversed the convictions, is a distinction without a difference. In effect, Balkany's court instructed the jury, or the jurors could have interpreted the instruction as though they "**must be absolutely and completely convinced by proof of a *mathematical certainty* of any contested fact [by the government] before they can *acquit* [Rabbi Balkany].**" This is clearly demonstrated where the judge stated, in relevant part, that: "It is virtually impossible for someone [any of jurors] to be

absolutely and completely convinced [that Balkany is innocent] of any [or a government] contested fact that by its nature is not subject [shown/proven] to [a] mathematical proof and certainty." (**Tr. R. at 1208**) (**App. 50-51**). This is the picture the jury *could have* envisioned based on the trial court's instruction. Based on the above instruction, the trial court *equated* reasonable doubt with "proof of a moral certainty," or rather, even more, where the court used the phrase "*not subject to mathematical certainty.*"

Put another way, the jurors could have interpreted the instruction to mean that "if Balkany's facts, claiming his innocence, was not the type that could be proven by a "mathematical proof and certainty," and if it was contested by the government, then the jury could not acquit him." On this basis, the instruction created a mandatory presumption and not a permissive inference; and to mean that, in order to acquit Balkany, the evidence cannot be contested by the government; and if contested, such evidence must be of a kind that is of a moral certainty or by proof of a mathematical certainty.

The threshold inquiry in evaluating whether a jury instruction impermissibly shifts the burden of proof is whether the instruction is a permissive inference or a mandatory presumption. *Francis v. Franklin*, 471 U.S. 307 (1985); and *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995). A permissive presumption merely allows an inference to be drawn, and it is constitutional so long as the inference would not be irrational. *Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Yates v. Evatt*, 500 U.S. 391 (1991). A mandatory presumption, on the other hand, requires the jury to infer the elemental fact if the prosecution proves certain basic facts beyond a reasonable doubt. *Allen*, 442 U.S. at 157.

Unlike a permissive presumption, a mandatory presumption does not allow the jury to reject the inference based on its independent evaluation of other evidence in the record. A presumption instruction that could be interpreted as removing the prosecution's burden of proving intent beyond a reasonable doubt deprives the defendant of due process. *Sandstrom v. Montano*, 442 U.S. 510, 515 (1979). Importantly, however, an unconstitutional

mandatory presumption in one part of the jury instruction may not be cured merely by inserting additional language in the instruction indicating that the defendant may rebut the presumption. See *Francis*, 471 U.S. at 318-20. Here, the jury charge, at issue, mandatorily required the jury to find Rabbi Balkany guilty unless his government contested facts could be proven "*by a mathematical certainty*." (**Tr. R. 1208**) (**App. 50-51**)

As the Court held, in *Sandstrom*, 442 U.S. at 514, 517, the effect of a presumption in a jury instruction is determined by the way in which a reasonable juror *could have* interpreted it, not by a [lower] court's interpretation of its legal import. Assuming, as we must, that the jury followed the court's instructions, the jury may have interpreted the challenged presumption as conclusive, or as a mandatory presumption, which is more likely than not. There, Justice Brennen wrote that:

> "[A]ny mandatory presumption, even if it is subject to being rebutted, operates to relieve the State [or Government] of its burden of proving that element of the offense."

Sandstrom, 442 U.S. at 510 (1979).

It is noteworthy, here, to emphasize that it was an *incorrect statement* for the court to inform the jury that "it [wa]s virtually impossible for [them] to be absolutely and completely *convinced* of any contested fact ... not subject to mathematical proof and certainty," (**App. 50-51**) because such is *not*, in fact, *impossible*. To the contrary, it is absolutely possible for a juror to be *convinced* of any contested fact that is not subject to mathematical proof and certainty. Being convinced does not require one to be correct in his/her assessment of the contested fact. All that is required is for the juror to believe the evidence one way or the other to his/her satisfaction, regardless of it being contested. It is not conditioned, as the district court mandated, on whether the fact was contested or not.

This Court has held that "[a] charge which mischaracterizes the concept of reasonable doubt **can never be harmless**." *Sullivan*, 508 U.S. 375 (1993). Because the jury instruction in Balkany's case may "have left the jury highly confused," the Second Circuit, itself, held that such "may, on that ground

alone, be [grounds to] reverse[]." *United States v. Kopstein*, 759 F. 3d 168 (2d Cir. 2014); And bear also in mind that "instructions are erroneous if they mislead the jury as to the correct legal standard, or do not adequately inform the jury of the law." *Hudson v. New York City*, 271 F. 3d 62, 67 (2d Cir. 2001).

Rabbi Balkany, petitioner, asserts that his Due Process and Sixth Amendment rights were violated by the unconstitutional jury charge; and, that both appellate and postconviction counsels should have raised this *Structural Error* at an earlier stage of this proceedings. However, because this Court has held that the challenge in this claim, *an unconstitutional reasonable doubt instruction*, infects the entire trial proceedings and renders it unfair and *per se reversible error*, the same falls under the umbrella of a fundamental miscarriage of justice for which the exception to the defaulted claims applies, or should be held to apply, for future/present references and clarification. Rabbi Balkany urges that this Court Remand this case to the district court to address merits of the claims challenged in Balkany's Coram Nobis petition, or otherwise to grant the relief

initially sought, to vacate the convictions on all counts of the indictment.

Consequently, however, in this case, the jury instruction created a *mandatory presumption* of guilt, leaving no room for the jurors to deem the instruction as a *permissive inference* which would allow them to exercise discretion, done in violation of *Cage v. Louisiana* and *Sandstrom v. Montano*, 442 U.S. 510 (1979).

ARGUMENT THREE

COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S SUMMARY DENIAL OF PETITIONER'S CORAM NOBIS CONTRARY TO THIS COURT'S DECISIONS IN *IN RE WINSHIP*, THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, AND *RICHARDSON V. UNITED STATES*, 526 U.S. 813 (1999)

Applying the rule established in *Martinez v. Ryan*, supra— "that a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if the default

results from the *ineffective assistance of the prisoner's counsel in the collateral proceeding*"—Balkany asserts that the court of appeals erred, reversibly, in affirming the district court's denial of his coram nobis without addressing the merits of its claims, save for the request for recusal, for which the court denied, albeit, Balkany believes, was also in error.

This argument is premised on the basis that Counts Two and Four of the indictment must, as a matter of law, be vacated in light of the jury's verdict form's failure to "render a verdict." Stated differently, the Court informed the jury that the government had charged Rabbi Balkany, in Counts Two and Four, under [dual] theories, but that the government needed only to prove one, not both, theory(ies) in order to establish guilt beyond a reasonable doubt.

Additionally, the Court made clear that not only must the jurors agree, unanimously, as to the guilt of Rabbi Balkany under these two counts, but, also, that the jurors must agree, unanimously, as to the **same theory** of guilt. Which, of course, without that unanimous agreement, there can be no guilty verdict. To be sure, the Court stated:

> "Count Two charges that the defendant demanded **or** received money for not permitting an individual to inform law enforcement authorities of alleged illegal conduct ... [and that] [t]he government must prove either that the defendant **demanded or received** money; it need not prove both. *To find the defendant guilty*, however, ***you must be*** **unanimous** *as to* **which of these acts** the government has proven. ***Similarly***, the government must prove that the demand or receipt of money *was either under a threat of informing or as consideration for not informing*; it need not prove both. To find the defendant guilty, **you must be unanimous** as to **which of these occurred**."

(**Tr. 1219-21**) (**App. 52**). Here, the Court made clear that, in order for the jury to convict Rabbi Balkany, the jury had to *unanimously agree* on ***two specific acts***. In particular, the jury was required to find (1) that *all twelve jurors agreed* that Rabbi Balkany "demanded" **or** "received" money. That is, all twelve

jurors had to agree that Rabbi Balkany **demanded** money, or, otherwise, all twelve jurors had to agree that Rabbi Balkany **received** money. It was not sufficient that the jury simply return a verdict stating "guilty" as to Counts One, two, three, or four. Moreover, the jury, additionally, was required to find (2) that all twelve jurors agreed whether the *demanded or received* money "**was under a threat of informing**" *or* "**as a consideration for not informing**" law enforcement authorities of illegal conduct." (**Tr. 1219-20**) (**Id.**). If the jury's verdict form does not *specifically articulate* these two unanimous acts—that Rabbi Balkany demanded money or received money, **and** that Rabbi Balkany did so under the threat of not allowing an individual to inform authorities of illegal conduct or that Rabbi Balkany did so as a consideration for not allowing the individual to inform authorities of illegal conduct—then the jury *failed to render or return a valid and/or complete verdict*, which, essentially constitutes a **not guilty verdict**. (**Tr. R. 1247**) (**See App. 55-57**) (copy of verdict form).

This same dialogue was repeated by the district court as it relates to Count Four of the indictment. There, the Court informed the jury that the government, as in Count Two, had charged Rabbi Balkany under [dual] theories but was only required to prove *either* of the two theories, *not both*; and, that the government had to prove, and the jury had to agree upon the same, one theory. Specifically, the Court instructed the jury that:

> "Count Four charges that the defendant made false statements... The first element that the government must prove beyond a reasonable doubt *lists two kinds of conduct*: concealing a material fact **or** making a materially false statement. If you find that the government has proved either of these two types of conduct beyond a reasonable doubt, that is sufficient, *but you* ***must be unanimous*** as to ***which of the two types*** *of conduct the government has proven."*

(**Tr. 1221-22**) (**App. App. 58-59**). Here, the Court made clear that the jury must not only agree that Rabbi Balkany was guilty of the alleged falsity of the statement, (**App. 59**) but, also, that the jury must *unanimously agree* on "**which of the two types** of conduct—concealing a material fact **or** making a

materially false statement—Rabbi Balkany allegedly committed." (**Id.**) Absent a **specific finding** of each of these two factors, the same constitutes a finding of *not guilty*, as neither, standing alone, amounts to a finding of guilt as instructed by the Court.

Constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory. See *Skilling v. United States*, 561 U.S. 358, 177 L. Ed 2d 1, 130 S. Ct. 2896 (2010); also, *Yates v. United States*, 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957); *U.S. v. Verbitskaya*, 406 F. 3d 1324 (11th Cir. 2005). Here, as demonstrated herein above, the district court **specifically instructed the jury** that in order to find [Rabbi Balkany] guilty, that they, the jurors, had to *unanimously* agree not only that the government proved beyond a reasonable doubt [his] guilt, but also on "*which theory*" the government proved. A jury is presumed to follow the jury instructions as given to it by the district court. *U.S. v. Bennett*, 368 F. 3d 1343, 1351 (11th Cir. 2004). The verdict in this case is contrary to court's instruction, and with the jury instructions as given by

the district court, such cannot be said to represent a finding of guilt. The Court of Appeals for the Fifth and Eleventh Circuits said it best where they held that:

> "A verdict contains an inconsistency if answers given by the jury may not fairly be said to represent a logical and probable decision on the relevant issues submitted."

See *Aquachem Co. v. Olin Co.*, 699 F. 2d 516, 521 (11th Cir. 1983); *Griffin v. Mathern*, 471 F. 2d 911, 915 (5th Cir. 1973); and *Wilbur v. Corr. Servs. Corp.*, 393 F. 3d 1192, 1200 (11th Cir. 2004). Rabbi Balkany, by no means, makes the claim that his argument rest upon a "general verdict" theory; but, rather, that he was denied "Due Process" and his "Sixth Amendment right to effective assistance of counsel" due to him when counsel failed to secure the process of "fairness" guaranteed by the Due Process Clause before a person may be deprived of his liberty.

To be sure, the law makes clear that "[t]he defendant has a right to expect that his attorney will use every skill, expend every energy, and tap every legitimate resource in exercise of independent professional judgment on behalf of defendant and in

undertaking representation." *Frazier v. U.S.*, 18 F. 3d 778, 779 (9th Cir. 1994). Under the U.S.C.A. Const. Amendment 6, counsel owes the defendant a duty of loyalty, unhindered by State or counsel's constitutionally deficient performance. Under the Due Process Clause of the Fifth Amendment, the Supreme Court of the United States, in evaluating due process claims, inquires whether the practice "offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 219 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934).

Because, as here, where the jury failed to follow the instructions of the Court in determining the guilt or innocence of the defendant, the Court must err on the side of caution, and vacate the convictions, rather than to *speculate* as to what the jurors *may have* concluded independently had they obeyed the Court's instructions. Borrowing from the language of the Honorable JUSTICE FRANKFURTER, due process:

> "Embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just."

Solesbee v. Balkcom, 339 U.S. 9, 16, 70 S. Ct. 457, 461, 94 L. Ed. 604 (1950).

In the instant case, Rabbi Balkany's due process and jury trial rights were violated when the Court entered a judgment of guilty despite the presence of what appeared to be a unanimous jury verdict announcing guilty, but, in fact, was a non-verdict. The Supreme Court of the United States has emphasized that:

> "There are instances, furthermore, where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome [of the verdict or trial]."

Kimmelman v. Morrison, 477 U.S. 365 (1986). In closing, this claim, Rabbi Balkany reminds the Court that, as asserted by the Ninth Circuit Court of Appeals:

> "An adequate Sixth Amendment remedy must neutralize the taint of a constitutional violation."

Johnson v. Uribe, 682 F. 3d 1238 (9th Cir. 2012); but, since however, Rabbi Balkany has served his imprisonment and Supervised Release, the only reasonable course of action, or relief, available and deserving is, of course, that the convictions shall be vacated and that, however, would, as stated by *Johnson v. Uribe*, "**put the defendant back in the position he would have been in if the Sixth Amendment violation never occurred.**" *Johnson*, 682 F. 3d at 1244-46. Rabbi Balkany, while acknowledging that the district court did ask:

> "Mr. Marshal, do you have the special verdict form," to which the Foreperson answered, "[y]es I do [Y]our Honor." (Tr. 1247) Thereafter, the following colloquy took place: "Ladies and gentlemen of the jury, I'm going to read your verdict to you. I ask each of you to listen with care, and then I will ask each of you if what I read is your verdict."

Count One, extortion: Guilty.

Count Two, wire fraud: Guilty.

Count Three, blackmail: Guilty.

Count Four, false statements: Guilty.

(Jury polled; all answered in the affirmative)

The Court: Counsel, is there any reason why I cannot now excuse this jury? (App. A-10) (Tr. 1247-48). By answering in the negative, the Court excused the jury.

Rabbi Balkany seeks reversal on these grounds because, without interrogatories demonstrating the jurors' consistency with the Court's jury charge, as stated above, the verdict as read and entered by the district court deprived the court of authority to enter a guilty verdict as a matter of law. See *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Fed. R. Crim. P. 31(a)*; *U.S. v. Kozeny*, 667 F. 3d 122, 131 (2d Cir. 2011) (federal criminal jury cannot convict unless it *unanimously finds* Government has proved *each element* of crime); and *U.S. v. Gonzalez*, 786 F. 3d 714, 716 (9th Cir. 2015) (defendant in federal prosecution has constitutional right to unanimous jury verdict). Because the verdict, here, is *not* unanimous, in the

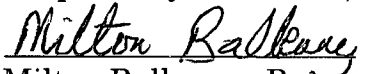
sense that it failed to display each element as defined by the Court, and as mandatorily required before a guilty verdict may issue, it cannot be said that a guilty verdict was rendered in this case, as stated in *In re Winship*. The verdict, as a matter of law, must be vacated.

In light of the decision of the Second Circuit Court of Appeals, affirming the district court's refusal to address the merits of Balkany's coram nobis which relies upon this Court's longstanding precedents and exceptions to the defaulted claims' doctrine, future defendants will suffer a similar fate and denial of due process subjecting innocent persons to possibly life imprisonment without the possibility of parole, or long or short-term unconstitutional prison terms, based solely on the unfortunate ineffectiveness of counsel who will endure no suffering as a result of his/her constitutional errors.

CONCLUSION

WHEREFORE, based on the foregoing petition, facts, and authorities, the Court should GRANT the writ of certiorari to the Court of Appeals for the Second Circuit, or, otherwise, GVR this case with instructions to grant the petition and dismiss the indictment with prejudice.

Respectfully submitted,



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