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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-3864
	)	
DIVNA MASLENJAK, Defendant-Appellant.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:13-cr-00126—Benita Y. Pearson, District Judge.

Argued: October 8, 2015

Decided and Filed: April 7, 2016

Before: GIBBONS and McKEAGUE, Circuit Judges; ANDERSON, District Judge*.

COUNSEL

ARGUED: Patrick Haney, KIRKLAND & ELLIS, LLP, Washington, D.C., for Appellant. Daniel R. Ranke, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee. ON BRIEF: Gregory L. Skidmore, Jeff D. Nye, KIRKLAND & ELLIS, LLP, Washington, D.C., for Appellant. Daniel R. Ranke, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

ANDERSON, D.J., delivered the opinion of the court in which GIBBONS and McKEAGUE, JJ., joined. GIBBONS, J. (pg. 27), delivered a separate concurring opinion.

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*The Honorable S. Thomas Anderson, United States District Judge for the Western District of Tennessee, sitting by designation.

OPINION

S. THOMAS ANDERSON, District Judge. Divna Maslenjak appeals her conviction for knowingly procuring her naturalization contrary to law in violation of 18 U.S.C. § 1425(a). Maslenjak, an ethnic Serb and citizen of Bosnia, came to the United States in 2000 as a refugee fleeing the civil war in the former Yugoslavia. Maslenjak claimed she and her family feared persecution in Bosnia because her husband had evaded conscription into the Serbian army during the war. In fact, Maslenjak's husband had not been in the Serbian militia during the war but had served as an officer in a unit implicated in war crimes. Maslenjak was granted refugee status and ultimately obtained her naturalization. Based on her misrepresentations during the immigration process, a jury found Maslenjak guilty of knowingly procuring her naturalization contrary to law in violation of 18 U.S.C. § 1425(a) and of knowingly using an unlawfully issued certificate of naturalization in violation of 18 U.S.C. § 1423.

On appeal, Maslenjak argues that the district court improperly instructed the jury that her false statements need not be material in order to convict Maslenjak of procuring her naturalization contrary to law. In the alternative, Maslenjak argues that the district court erroneously instructed the jury that it could also convict Maslenjak if the jury found that she

taking place there during the war. In April 1998, Maslenjak and her family met with Monia Rahmeyer, an officer with the United States Immigration and Naturalization Service in Belgrade, to seek refugee status based on their fear of persecution in their home region of Bosnia. The interview was conducted with a translator.

No writing or recording of the interview exists to show what questions Rahmeyer asked Maslenjak or what responses Maslenjak provided to the questions. The proof at trial showed that Maslenjak acted as the primary applicant on her family's asylum application. Maslenjak stated under oath during the interview that her family feared persecution back in Bosnia owing to the fact that her husband did not serve in the military during the war. Maslenjak explained that when she returned to Bosnia with her children in 1992, her husband remained in Jagodina, Serbia, to avoid conscription into the Bosnian Serb army during the Bosnian civil war. According to Maslenjak, she and her husband had lived apart from 1992 to 1997. Based on these representations, Maslenjak and her family were granted refugee status in 1999 and immigrated to the United States in September 2000 where they settled in Ohio. Maslenjak subsequently obtained lawful permanent resident status in 2004.

On December 5, 2006, special agents of Immigration and Customs Enforcement questioned Maslenjak's husband, Ramiz Maslenjak, at the family home as part of an investigation

she had ever "knowingly given false or misleading information to any U.S. government official while applying for any immigration benefit or to avoid deportation, exclusion, or removal." A separate question asked whether Maslenjak had "ever lied to any U.S. government official to gain entry or admission into the United States." Maslenjak answered "no" to both questions on

Maslenjak's naturalization revoked under 8 U.S.C. § 1451(e). Maslenjak's timely appeal followed.

II.

This court reviews challenges to jury

procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship." 18 U.S.C. § 1425(a). A plain reading of the statute suggests that materiality is not an element of the offense. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Dixon v. United States, 548 U.S. 1, 7 (2006) (quoting Liparota v. United States, 471 U.S. 419, 424 (1985)). Accordingly, courts "ordinarily resist reading words or elements into a statute that do not appear on its face." Dean v. United States, 556 U.S. 568, 572 (2009). Obviously, the term "material" is found nowhere in § 1425(a). Without statutory support for an element of materiality, we are hard pressed to conclude that materiality is an element of the offense under 18 U.S.C. § 1425(a).

As a matter of statutory interpretation, the absence of the term would normally end our inquiry. Maslenjak apparently concedes as much and instead argues on appeal that materiality is implied as an element of 18 U.S.C. § 1425(a).

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element of the government's case in a denaturalization proceeding under § 1451(a). *Kungys*, 485 U.S. at 767–68.[2]

Under § 1451(a), the government institutes a denaturalization proceeding by filing a petition and "affidavit showing good cause" in the district where the naturalized citizen resides. 8 U.S.C. § 1451(a) The naturalized citizen then has 60 days in which to file an answer. § 1451(b). The government has the initial burden to adduce "clear, unequivocal, and convincing" proof that the naturalized citizen has procured his naturalization by one of the improper means listed in § 1451(a), including the concealment of a material fact. *Fedorenko v. United States*, 449 U.S. 490, 505 (1981). "Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." *Id.* at 505–06. Once the government has carried its burden and proven the naturalized citizen improperly procured his naturalization, a "presumption of ineligibility" arises, "which the naturalized citizen is then called upon to rebut." *United States v. Puerta*, 982 F.2d 1297, 1303–04 (9th Cir. 1992) (quoting *Kungys*, 485 U.S. at 783–84 (Brennan, J., concurring)).

The burden-shifting of § 1451(a)'s denaturalization procedure underscores the fact that "[a] denaturalization suit is not a criminal proceeding," *Schneiderman v. United States*, 320 U.S. 118, 160 (1943), but a "civil case." *Addington v. Texas*, 441 U.S. 418, 424 (1979). The Supreme Court has described denaturalization under § 1451(a) as "a suit in equity." *Fedorenko*, 449 U.S. at 516 (1981) (citations omitted). Rather than being a penal sanction, denaturalization "imposes no punishment upon an alien who has merely procured a certificate of citizenship by fraud or other illegal conduct It simply deprives him of his ill-gotten privileges." *Johannessen v. United States*, 225 U.S. 227, 242 (1912). In contrasting a civil denaturalization proceeding under § 1451(a) with a typical criminal proceeding, the Sixth Circuit has remarked "[c]riminal cases offer many due process protections--e.g., jury trial, indictment, beyond-a-reasonable-doubt burden of proof, right to counsel--that civil proceedings, including

[2]The Supreme Court's holding in *Kungys* about the definition of materiality and the question of whether the government's proof agains

denaturalization proceedings, do not." United States v. Mandycz, 447 F.3d 951, 962 (6th Cir. 2006).

The denaturalization statute, § 1451(e), goes on to establish a second, alternative path to denaturalization. That paragraph states that "[w]hen a person shall be convicted under

naturalization." The district court's instruction in this regard clearly tracked the language of 18 U.S.C. § 1015(a), which makes it a crime to make "any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registration of aliens." 18 U.S.C. § 1015(a).

We hold that the district court's instruction on the "contrary to law" element was a correct statement of the law. First, 18 U.S.C. § 1425(a)'s "contrary to law" element is broad enough to cover the predicate violation of law at issue, namely, making false statements in an immigration proceeding in violation of 18 U.S.C. § 1015(a). We construe the phrase "contrary to law" to mean "contrary to all laws applicable to naturalization." The Supreme Court has emphasized the importance of strict compliance with the laws and requirements for naturalization.

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . . and demand its cancellation unless issued in accordance with such requirements."

Fedorenko, 449 U.S. at 506 (quoting *United States v. Ginsberg*, 243 U.S. 472, 474–475 (1917)). The INA spells out these requirements. It follows then that the failure to comply with the INA's requirements for naturalization would be "contrary to law."

We have also affirmed convictions under § 1425(a) where the predicate or underlying violation of law was another criminal offense, and not just a failure to comply with the INA.

underlying violation of 18 U.S.C. § 1546(a).[3] The phrase "contrary to law" is broad enough to include not only violations of the INA's administrative requirements for naturalization but also any criminal offense against the United States pertaining to naturalization, including making false statements.

The Ninth Circuit in United States v. Puerta seemed to read § 1425(a)'s "contrary to law" element to mean "contrary to the INA," and only the INA. The Puerta court stated "Congress has addressed the impact of immaterial false testimony only in the 'good moral character' provision in 8 U.S.C. § 1101(f)(6)." Puerta, 982 F.2d at 1302 (emphasis added). In point of fact, Congress has addressed the impact of immaterial false testimony in Title 18 and made it a criminal offense to make "any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registration of aliens." 18 U.S.C. § 1015(a). The Ninth Circuit apparently understood "contrary to law" to mean only "contrary to the INA." But if § 1425(a) reached only violations of the INA and its administrative prerequisites for citizenship, then § 1425(a)'s "contrary to law" element would actually mean "contrary to the INA but not 18 U.S.C. § 1015(a) or any other federal law criminalizing specific conduct in an immigration proceeding." We find no principled reason to construe the phrase in this limited way.[4] The most reasoned construction of § 1425(a)'s "contrary to law" element is simply "contrary to all laws applicable to naturalization," and not just the INA.

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[3]The Board of Immigration Appeals has construed 18 U.S.C. § 1425(a)'s contrary to law element to include violations of both 18 U.S.C. § 1001 (the federal perjury statute) and § 1015(a). Ezeagwuzadeh v. Winfrey, 467 F.3d 451, 457–58 (5th Cir. 2006).

[4]It is true that the phrase "contrary to law" appears in only a handful of federal criminal statutes besides 18 U.S.C. § 1425(a). See 18 U.S.C. § 545 (smuggling goods into the United States "contrary to law"); 18 U.S.C. § 1693 (mishandling mail "contrary to law"); 18 U.S.C. § 1697 (transport of persons acting as private express who themselves transport letters "contrary to law"). As such, the case law construing the phrase "contrary to law," as Title 18 uses it, is somewhat scarce. Nevertheless, construction of the federal smuggling statute, 18 U.S.C. § 545, and its "contrary to law" element further supports the notion that "contrary to law" should be read broadly to include criminal offenses against the laws of the United States. In United States v. Teh, the defendant was charged with smuggling bootleg films into the country "contrary to law" in violation of § 545. United States v. Teh,

Of course, the predicate act or conduct term a in a prosecution under § 1425(a). Where the government establishes the "contrary to law" element of § 1425(a) by proving an underlying criminal act and the criminal act has as one of its elements a material false statement, proof of materiality should arguably be required to obtain a conviction under § 1425(a). Our recent case of United States v. Shordja, 598 F. App'x 351 (6th Cir. 2015) illustrates this proposition. Like Maslenjak, the defendant in Shordja was charged with procuring his naturalization in violation of 18 U.S.C. § 1425(a). The defendant provided the same false answers to the same questions on the same application for naturalization. Shordja, 598 F. App'x at 351–52. But the government in Shordja conceded that proof of materiality was a required element of the offense under § 1425(a), a position seemingly inconsistent with its stance in this appeal. Id. at 354 ("Although we have not yet addressed the question of whether to recognize a materiality requirement in § 1425(a), the Government concedes that the statutory provision contains a materiality element.").[6]

However, unlike Maslenjak, the defendant in Shordja was also charged with one count of making false statements to a government affiliate in violation of 18 U.S.C. § 1001(a)(2). See also Latchin, 554 F.3d at 712. In other words, the government's theory of the case was that the defendant procured his naturalization "contrary to law" by violating the federal perjury statute, which has as one of its elements proof of materiality. 18 U.S.C. § 1001(a)(2) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully makes any materially false, fictitious, or fraudulent statement or representation . . . shall be [punished]."); United States v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999) ("The elements required to establish a violation of 18 U.S.C. § 1001 are . . . . that the false statement was material."). Where as in Shordja a defendant is charged under 18 U.S.C. § 1425(a) with knowingly procuring naturalization contrary to law and the predicate violation of law is perjury under § 1001(a), it stands to reason that proof of materiality should be required to prove that the defendant procured his naturalization "contrary to law."

[6]Without deciding whether materiality was an element of 18 U.S.C. § 1425(a), we held that it was not plain error for the district court to fail to instruct the jury on materiality and that there was sufficient evidence of materiality to sustain the conviction. Shordja, 598 F. App'x at 354-55.

We need not fully resolve this last point to decide this case. Maslenjak was not charged under the perjury statute, and the district court did not instruct the jury on the elements of § 1001(a). The theory of the government's case against Maslenjak was that she procured her naturalization "contrary to law," in part by making false statements in an immigration proceeding in violation of 18 U.S.C. § 1015(a), not by committing perjury in violation of § 1001(a). A material false statement is not an element of the crime under § 1015(a). Therefore, we conclude that materiality is not an implied element of 18 U.S.C. § 1425(a) where the underlying "contrary to the law" conduct is making a false statement in violation of 18 U.S.C. § 1015(a).

We recognize that Maslenjak's position finds support in a number of other circuit decisions holding that materiality is an implied element of 18 U.S.C. § 1425(a). By and large, we find these decisions unpersuasive. The leading case supporting Maslenjak's position is United States v. Puerta, where the Ninth Circuit read an implied materiality requirement into § 1425(a). Puerta, 982 F.2d at 1301. The defendant in Puerta made false statements on his application for naturalization where he did not answer a question about whether he had ever used an alias (he had) and answered that he had been absent from the United States since he entered the country for permanent residence (he was). *Id.* at 1298–99. The defendant was charged under 18 U.S.C. § 1425(a), and following a bench trial, the district court found him guilty of procuring his naturalization contrary to law and proceeded to denaturalize him pursuant to 8 U.S.C. § 1451(e). *Id.* at 1299–1300.

The Ninth Circuit reversed, holding that the government had to prove that the defendant's statements were material. The *Puerta* court based its holding on two factors: (1) proof of materiality was required in a civil denaturalization proceeding under 8 U.S.C. § 1451(a); and (2) the "gravity of the consequences" of mandatory denaturalization justified a showing of materiality under 18 U.S.C. § 1425(a). *Id.* at 1301 (citation omitted). Notably, the parties in *Puerta* agreed that the materiality requirement in the civil denaturalization proceeding implied materiality as an element of 18 U.S.C. § 1425(a) as well. *Id.* As a result, the Ninth Circuit did not apply the typical rules of statutory construction. The Ninth Circuit ultimately concluded that

"Puerta's false statements were not material, and therefore may not form the basis of a criminal conviction under § 1425." Id. at 1304.

Other circuits have followed the Ninth Circuit's decision in Puerta but without engaging in their own analysis of the statutory language. The First Circuit has assumed like the Ninth Circuit that materiality is an element of 18 U.S.C. § 1425(a) because it is an element of civil denaturalization under 8 U.S.C. § 1451(a). Mensah, 737 F.3d at 808–09; Munyenyezi, 781 F.3d at 536. The Seventh Circuit adopted the materiality element, at least in part, because, just as in Puerta, the parties to the case agreed that it was an element of 18 U.S.C. § 1425(a).

It is well settled in the Ninth Circuit (and in other circuits following the Ninth's holding in Puerta) that proof of materiality is not a required element of 18 U.S.C. § 1015(a). Yousseff, 547 F.3d at 1094; see also Abuagla, 336 F.3d at 278; Seventh Cir. Pattern Jury Instr. for 18 U.S.C. § 1015(a). Nor is proof of materiality required in other sections of the INA addressing false testimony. The INA at 8 U.S.C. § 1427(a)(3) makes "good moral character" a condition precedent to naturalization. 8 U.S.C. § 1427(a)(3). And 8 U.S.C. § 1101(f)(6) precludes a finding of "good moral character" for any naturalization applicant who "has given false testimony for the purpose of obtaining any benefit" under the INA. 8 U.S.C. § 1101(f)(6).[8] The Supreme Court in Kungys concluded that § 1101(f)(6) does not contain a materiality requirement. Kungys, 485 U.S. at 779–80 (holding that 8 U.S.C. § 1101(f)(6) does not contain a materiality requirement for false testimony). Reading an implied materiality element into § 1425(a) would mean then that a defendant could give immaterial false testimony for the purpose of obtaining an immigration benefit, thereby failing to meet the requirements for naturalization under 8 U.S.C. § 1427(a)(3) and 8 U.S.C. § 1101(f)(6) but still not be guilty of knowingly procuring his citizenship "contrary to law" in violation of 18 U.S.C. § 1425(a). Requiring proof of materiality under 18 U.S.C. § 1425(a) is incompatible with these other federal laws applicable to false statements in immigration proceedings.

As Puerta and its progeny highlight, the United States has taken a contrary position on the materiality issue in different cases before different courts, including this one, though we have noted why Shordji is distinguishable in this regard. While the government could not account for these inconsistencies at oral argument, "[t]here is, of course, no rule of law to the effect that the Government must be consistent in its stance in litigation over the years." Barrett v. United States, 423 U.S. 212, 222 n.6 (1976) (citation omitted);

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denaturalization which is criminal in nature, because § 1451(e) makes denaturalization mandatory where the citizen is found guilty of violating 18 U.S.C. § 1425. Obviously, the alternative procedure requires the government to seek an indictment and establish probable cause, afford the citizen all of the constitutional due process rights owed whenever a person is accused of a criminal act, and meet a higher burden of proof (beyond a reasonable doubt).[11] See Mandycz, 447 F.3d at 962 ("Criminal cases offer many due process protections—jury trial, indictment, beyond-a-reasonable-doubt burden of proof, right to counsel—that civil proceedings, including denaturalization proceedings, do not.").

Accepting then that Congress has provided alternative procedures and standards of proof under § 1451(a) and § 1451(e), the explicit requirement of materiality under one approach but not the other is actually consistent with a two-track statutory scheme for denaturalization. In a civil denaturalization suit, the government can bring its case simply by filing an equitable petition, proceed as in a civil case, and satisfy a lesser burden of proof than beyond a reasonable doubt. In light of the slightly lower burden of proof, Congress has required the government to prove that the naturalized citizen has concealed a material fact. By contrast, in a criminal case resulting in denaturalization, the government must prove the charge under 18 U.S.C. § 1425 beyond a reasonable doubt while meeting the demands of constitutional due process. Congress has not required proof of materiality in that scenario arguably because of the higher burden of

[11] See

proof, the additional safeguards for the naturalized citizen's constitutional rights, and the broad sweep of § 1425 itself.

So in a criminal prosecution under § 1425, the Constitution itself cures any concerns about the "gravity of the consequences" of mandatory denaturalization without requiring proof of materiality. Puertaat 1301. And if it were otherwise and materiality was a required element of both civil and criminal denaturalization proceedings, the government would have little incentive to ever pursue the denaturalizat

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conviction does not run afoul of this principle. Maslenjak was found guilty of knowingly procuring her naturalization contrary to law, and her guilty act was illegally procuring or obtaining her naturalization. Section 1425(a) criminalizes conduct and not status by punishing the act of knowingly procuring naturalization in some way contrary to the laws applicable to naturalization. Section 1425(a) does not make it a crime to lack good moral character. Maslenjak's first constitutional challenge is not convincing.

It is true that the government's theory of the case was based on Maslenjak's ineligibility for naturalization. The United States presented proof at trial and argued to the jury that Maslenjak was not eligible for naturalization because of her false testimony about the answers on her N-400 Application for Naturalization. Under 8 U.S.C. § 1101(f)(6), Maslenjak's false testimony for the purpose of obtaining a benefit disqualified her as a candidate for naturalization. And it is well-established that "[c]itizenship is illegally procured any time the applicant has failed to comply with any of the congressionally imposed prerequisites to the acquisition of citizenship." United States v. Sprogis, 763 F.2d 115, 117 n.2 (2d Cir. 1985) (quoting Fedorenko, 449 U.S. at 506)). Maslenjak was not found guilty of a particular status, i.e. a lack of good moral character, but guilty of culpable conduct, i.e. procuring her naturalization with the knowledge that she was ineligible because she had given false testimony.

Maslenjak again relies on the Ninth Circuit's decision in Puerta for support. The Ninth Circuit held there that "simply being a person who cannot establish [good moral character] in court is not a crime." Puerta, 982 F.2d at 1302. The Ninth Circuit's reasoning on this point is not persuasive. In a prosecution under 18 U.S.C. § 1425(a), the defendant does not have the burden to establish anything at all, including good moral character. It is the government's burden to prove beyond a reasonable doubt that the defendant knowingly procured her naturalization in some way contrary to law, in violation of a criminal statute, 18 U.S.C. § 1425(a). Although the INA at 8 U.S.C. § 1101(f) defines what good moral character is not, the INA does not make it crime to lack good moral character. The Ninth Circuit also concluded that Congress had only addressed false testimony in an immigration proceeding at 8 U.S.C. § 1101(f)(6). But, as we have already noted, the Ninth Circuit's observation is not an accurate statement of law. Congress has actually made it a crime to make "any false statement under

oath" in a matter related to naturalization pursuant to 18 U.S.C. § 1015(a). As such, there is no support for Maslenjak's claim that 8 U.S.C. § 1101(f)(6) somehow creates a status-based crime

person of good moral character who, during the period for which good moral character is required to be established, is or was one who has given false testimony for the purpose of obtaining any benefits under this chapter." 8 U.S.C.A. § 1101(f)(6). The statute defines a series of factors which will preclude a finding of good moral character. The particular factor challenged by Maslenjak defines conduct, giving false testimony, and calls for the determination of "clear questions of fact" susceptible to "a true-or-false determination, not a subjective judgment such as whether conduct is 'annoying' or 'indecent.'" *Williams*, 553 U.S. at 306; *see also Dang*, 488 F.3d at 1141 (holding that 8 U.S.C. § 1101(f), the good moral character catch-all provision and its implementing regulation was not constitutionally vague as applied in that case). Therefore, we reject Maslenjak's vagueness challenge.

C.

Maslenjak next challenges the district court's instructions to the jury about what the government had to prove to show that Maslenjak had given false testimony for the purpose of procuring an immigration benefit and how her false testimony meant she did not meet the INA's good moral character requirement. Specifically, Maslenjak argues that the district court failed to explain that "testimony" under § 1101(f) had to be an oral statement or that Maslenjak had to give false testimony with the specific intent to obtain an immigration benefit. The Supreme Court in *Kungys* carefully construed § 1101(f)(6) and concluded that the false testimony described in the statute need not be material in order to find that a person lacked good moral character. In explaining why its "literal reading of the statute does not produce draconian results," the *Kungys* court first noted that "'testimony' is limited to oral statements made under oath" and does not include "other types of misrepresentations or concealments, such as falsified documents or statements not made under oath." *Kungys*, 485 U.S. at 780 (citations omitted). Whether a statement or misrepresentation qualifies as "testimony" is a question of law. *Id.* at 782. The Supreme Court also explained that a literal reading of § 1101(f)(6) did not produce

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We need not reach this issue because the district court did not instruct on this theory, and Maslenjak has otherwise failed to demonstrate how this paragraph was "applied" to her. Maslenjak does claim that "[n]othing in the instructions defined 'good moral character' or even limited the methods by which the government could prove that Ms. Maslenjak lacked good moral character." Opening Br. 43. But Maslenjak's claim is belied by what the district court actually stated in its ch

unduly harsh results because that section "applies only to those misrepresentations made with the subjective intent of obtaining immigration benefits" and not "misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, Id. at 780. Whether the applicant acted with the requisite intent is, of course, a question of fact for the jury. Id. at 782.

We hold that the district court did not abuse its discretion because the instructions, taken as a whole, accurately reflected the law. Ross, 502 F.3d at 527. With respect to the instructions about the necessary intent, the jury charge correctly stated that "[g]iving false testimony for the purpose of obtaining any immigration benefit precludes someone from being regarded as having good moral character," which in turn means "the applicant is not entitled to naturalization." ECF 62, Jury Instr., Page ID 1121. This instruction is a clear and accurate statement of law. Therefore, no abuse of discretion occurred.

As for the instruction about "false testimony," the district court did not define "testimony" to limit the term to oral statements and did not instruct the jury which of Maslenjak's statements constituted "testimony." More fundamentally, the district court did not recognize that the issue of whether any of Maslenjak's statements even met the legal definition of "testimony" under 8 U.S.C. § 1101(f)(6) was a question of law. The instruction as given did not address any of these aspects of the "false testimony" element, as the Supreme Court described it in Kungys. Nevertheless, when viewed as a whole, it cannot be said that the jury instructions were "confusing, misleading, or prejudicial." Richardson, 793 F.3d at 629.

And even if the district court's instruction about "testimony" was erroneous, the error was harmless. The harmless-error standard applies "to cases involving improper instructions on a single element of the offense." Neder v. United States, 527 U.S. 1, 9 (1999); Richardson, 793 F.3d 612, 631 ("[A] jury instruction that misdescribes or omits an element of an offense is subject to harmless error review.") (citation omitted). Any error regarding the jury instruction on the single element of "false testimony" was harmless in this case. The record is replete with oral statements made by Maslenjak under oath during her interviews with immigration officials, which meet the legal definition of "testimony." Perhaps more importantly, the evidence the jury heard does not include any other proof "that could rationally lead to a contrary finding with

respect to the omitted element." *Richardson*, 793 F.3d at 632 (quoting *Neder*, 527 U.S. at 19). Therefore, any error in the jury instructions was harmless.

IV.

For the reasons stated here, we AFFIRM the judgment of the district court.

CONCURRENCE

JULIA SMITH GIBBONS, concurring. I concur with some reluctance in the lead opinion's carefully-reasoned analysis. Initially, I was not inclined to differ from our sister circuits' interpretation of 18 U.S.C. §1425(a), but this analysis has persuaded me that the view most faithful to the statute is that materiality is not an element of the §1425(a) offense.

I am uncertain what goal Congress intended to further by omitting materiality from the elements of §1425(a). I have located no other federal criminal statute that punishes a defendant for an immaterial false statement. Nor have I located any analogous context in which the elements of a crime are less onerous than the elements of the related civil penalty proceeding.

Finally, I echo a point made in the lead opinion but put it more bluntly. The government's inconsistency in this case and on this issue is puzzling and indeed inappropriate. This is particularly so because the government, in response to questioning at oral argument, was unable to articulate any interest of the United States in prosecuting statements that are immaterial.

For all these reasons, our result here is troublesome. Yet we are not free to select our own notion of the best result in a case but instead are guided by what the law requires. That principle trumps any reluctance about joining the lead opinion.