APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10280-A

IN RE: LUIS E. MORALES,

Petitioner.

Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. § 2255(h)

Before: WILLIAM PRYOR, BRANCH and JULIE CARNES, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Luis E. Morales has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the

application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

Section 2244(b)(1) of Title 28 provides that a "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). The use of the term "application" in § 2244(b)(1) refers principally to the filing of a habeas petition in federal district court, but has also been applied to previous applications presented to this Court for leave to file a second or successive § 2255 motion. *See Tyler v. Cain*, 533 U.S. 656, 661 (2001); *In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016). A claim is the same as long as the gravamen of the legal argument is the same. *In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015). This bar on presenting the same claims is jurisdictional. *In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016).

In his application, Morales indicates that he wishes to raise nine grounds in a second or successive § 2255 motion. In his first claim, Morales argues that Congress exceeded its power when it enacted 18 U.S.C. § 2423(a) and therefore the district court lacked the power to adjudicate him guilty of that offense. Morales argues that § 2423(a) relies upon the commission of a state crime, but its doing so denied him due process because the conduct in question only needed to be something he could have been charged with. As a result, he was not innocent until proven guilty. Morales argues that this also subverts the guarantee of effective assistance of counsel. Morales contends that, by relying on conduct that a defendant could only be charged with, Congress violated the Constitution. Morales argues that federal courts should not improperly collude with

Congress to deny him due process. Morales argues that this claim is supported by a new rule of constitutional law and cites to *Rosemond v. United States*, 134 S. Ct. 1240 (2014). Morales argues that the only possible offense in his case was a state offense and there was never evidence of his intent to travel interstate for illegal sexual activity.

In his second claim, Morales argues that 18 U.S.C. § 2 could not be proven by the statutes he was convicted of. Morales contends that there was no evidence that he used the interstate travel of a minor to facilitate a sexual relationship with any of the victims or that illegal sexual activity was a dominant purpose or motive for the transportation. Morales argues that any illegal sexual activity was merely an incident of the travel. He further contends that there was no evidence that the defendants acted in concert to plan the interstate transportation of any minor for illegal sexual activity. Morales argues that intrastate violent crime is outside the scope of federal power. Morales argues that this claim is also supported by a new rule of constitutional law and again points to *Rosemond.*

In his third claim, Morales argues that he is actually innocent of any federal offense because the government only proved that he was alleged to have a propensity for minors and not that he intended to transport a minor across state lines for illegal sexual activity. He contends that the government presented no evidence demonstrating that crossing a state line showed an intent for sexual activity. Morales argues that, at most, he could be guilty of a state crime. He contends that this claim is supported by newly discovered evidence, and points to *Rosemond.* Morales also argues that he discovered evidence that old crimes were dismissed for lack of evidence and no new investigations were completed, but the government presented the evidence as proven. Morales

argues that his attorney was ineffective for failing to discover this and that, without the improper evidence, he would not have been convicted.

In his fourth claim, Morales argues that Federal Rule of Evidence ("FRE") 414 violates due process because it allows for a person to be convicted without a trial on the accused conduct. He contends that molestation is a physical offense but he was only charged with interstate movement with the goal of some physical offense occurring. Morales further argues that FRE 414 requires evidence of another offense that is admissible, but in his case there was not enough evidence to prove that any crime occurred and he was not tried or convicted of another offense. He contends that, without a trial on the conduct in question, a constitution violation occurred.

In his fifth claim, Morales contends that the district court did not independently determine if it had subject matter jurisdiction of his case and, in fact, did not have jurisdiction because of a faulty indictment. He contends that subject matter jurisdiction may be raised at any time. He further argues that his federal crimes were based on the Commerce Clause but his indictment does not allege any commercial activity, and that mere travel across state lines is not commercial. Morales argues that only state law crimes occurred, which were unrelated to interstate commerce.

In his sixth claim, Morales contends that various federal courts have expanded the definition of value under the Commerce Clause to include the title of being a prophet in a ministry, which is not commercial. He argues that the finding that being a prophet in a ministry is commercial violates the First Amendment. Morales argues that ordination comes from God, not man, and the courts have taken the position that God does not speak to man.

In his seventh claim, Morales argues that the courts and government have asserted that when members of a church greet each other with a kiss, it is sexual. He contends that they both

cited the fact that he kissed the alleged victim as evidence of engaging in sexual activity, which defies the teachings of Christianity and other religions. He argues that such a finding violates the First Amendment and that the government should not dictate the proper way for people to greet.

In his eighth claim, Morales argues that the district court and the government incorrectly determined that a person acting irrationally could knowingly waive a conflict with counsel. He contends that the government convinced the district court that, although he claimed that he did not need an attorney because his attorney was Jesus Christ, he was still able to assist in his defense and no competency hearing was required. In addition, Morales argues that there was direct evidence that he had a conflict with his primary counsel and so was not competent to assist in his defense. He contends that psychiatric evidence was necessary to conclude that he could competently assist in his trial.

In his ninth claim, Morales argues that the district court never obtained jurisdiction to try his case. He argues that he was indicted under an unconstitutional law and therefore the court had no jurisdiction to rule on his § 2255 motion. He contends that because there was no basis for the indictment there was also no basis for his subsequent adjudication. Morales therefore contends that the district court had no jurisdiction to rule on his motion and we must declare that 28 U.S.C. § 2255 is inadequate to challenge the district court's jurisdiction based on an unconstitutional statute. He argues that his judgment must be set aside because the district court never made an independent determination that the law he was indicted under was constitutional.

Morales has failed to raise a claim that satisfies the statutory criteria. As an initial matter, we are without jurisdiction to consider several of Morales's claims as they were raised in his amended § 2255 motion and denied with prejudice by the district court. *In re Baptiste*, 828 F.3d

at 1340; *In re Bradford*, 830 F.3d at 1277-78. Specifically, Morales argued below that the district court misinterpreted the term "accused" in FRE 414 too broadly, he had not been accused of any specific federal offenses related to sexual assault or child molestation, and he had a conflict with his counsel. He has raised those claims again, at least in part, in the fourth and eighth claims in his current application. We must therefore dismiss them. *In re Baptiste*, 828 F.3d at 1340; *In re Everett*, 797 F.3d at 1288.

Morales's remaining claims do not satisfy the statutory criteria because they are not supported by newly discovered evidence or a new rule of constitutional law. Morales asserts that *Rosemond* qualifies as both newly discovered evidence and a new rule of constitutional law but that case was decided prior to Morales's initial § 2255 motion and so cannot satisfy either of the statutory criteria. *See* 28 U.S.C. § 2255(h)(1), (2). Morales also argues that he discovered evidence that old crimes were dismissed for lack of evidence, but does not indicate when the evidence was found or why it could not be found prior to the filing of his initial § 2255 motion. 28 U.S.C. § 2255(h)(1). Morales does argue, however, that his attorney was ineffective for failing to discover the same information, which indicates that the evidence could have been discovered at or prior to his trial. Morales identifies no other cases of the Supreme Court and the factual basis of his claims involves alleged errors that occurred prior to or during his trial.

Accordingly, because Morales has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby DISMISSED IN PART AND DENIED IN PART.

APPENDIX B

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LUIS E. MORALES,

Petitioner,

v.

Case No: 6:15-cv-636-Orl-37KRS
(6:12-cr-121-Orl-37-KRS)

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

This case is before the Court on the following matters:

1. Petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(4) (Doc. 28) is **DISMISSED WITHOUT PREJUDCE** to allow Petitioner to seek authorization from the Eleventh Circuit to file a successive § 2255 motion. Petitioner argues for the first time that the criminal statute under which he was convicted is unconstitutional, which divested the Court of subject matter jurisdiction to convict him. (*Id.* at 2-5.)

Rule 60(b) "cannot be used to circumvent the prohibition on filing unauthorized successive post-conviction challenges." *United States v. Bueno-Sierra*, 723 F. App'x 850, 853 (11th Cir. 2018) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005) and *Franqui v. Florida*, 638 F.3d 1368, 1371-73 (11th Cir. 2011)). "A Rule 60(b) motion from a denial of a § 2255 motion is considered a successive motion if it 'seeks to add a new ground for relief' or

'attacks the federal court's previous resolution of a claim on the merits.'" *Id.* (quoting *Gonzalez*, 545 U.S. at 532).

The Court denied Petitioner's § 2255 motion on the merits on November 7, 2016, *see* Doc. 21, and the Eleventh Circuit Court of Appeals denied a certificate of appealability. *See* Doc. 27. The argument raised in the present motion is a new ground for relief, and the motion is merely an attempt to assert a claim of error as to Petitioner's federal convictions. Under the circumstances, the Rule 60(b) motion should be treated as a second or successive § 2255 motion.

Before Petitioner may file a second or successive § 2255 motion in this Court, he must move in the Eleventh Circuit Court of Appeals for an order authorizing the district court to consider the motion. *See* 28 U.S.C. §§ 2244 and 2255. Consequently, this motion is dismissed without prejudice to allow Petitioner the opportunity to seek authorization from the Eleventh Circuit Court of Appeals.[1] Petitioner should be aware that § 2255 limits the circumstances under which the appellate court will authorize the filing of a second or successive § 2255 motion.

2. The Clerk of the Court is directed to send Petitioner an "Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence 28 U.S.C. § 2255 By a Prisoner in Federal Custody" form.

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[1] Alternatively, Petitioner's Motion (Doc. 28) is **DENIED**. Pursuant to Rule 60(b)(4), a court may relieve a party from a final judgment or order if the judgment is void. "A judgment is void for Rule 60(b)(4) purposes 'if the rendering court was powerless to enter it.'" *Campbell v. Sec'y for Dep't of Corr.*, 370 F. App'x 5, 7 (11th Cir. 2010) (quoting *Burke v. Smith*, 252 F.3d 1260, 1263 (11th Cir. 2001)). Petitioner has not established that the Court was powerless to enter judgment.

3. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and **ORDERED** in Orlando, Florida on November 27, 2018.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party