

No. _____

In the Supreme Court of the United States

MANUEL LOPEZ-CASTRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the actual innocence gateway to review of procedurally defaulted habeas claims apply only where new evidence shows the defendant did not commit the charged conduct, or does the doctrine also apply where retroactively-applicable precedent establishes that the defendant's conduct was not criminal?

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceeding other than those listed in the style of the case.

RELATED CASES

- *United States v. Lopez-Castro*, No. 84-cr-853, U.S. District Court for the Southern District of Florida. Judgment entered Dec. 16, 1985.
- *United States v. Lopez-Castro*, No. 18-cv-21716, U.S. District Court for the Southern District of Florida. Judgment entered May 29, 2018.
- *United States v. Lopez-Castro*, No. 18-13218, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered May 23, 2019.

TABLE OF CONTENTS

QUESTION PRESENTED	i
INTERESTED PARTIES	ii
RELATED CASES	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	17
APPENDIX	
Decision of the Court of Appeals for the Eleventh Circuit Denying Certificate of Appealability, <i>Lopez-Castro v. United States</i> , No. 18-13218 (May 23, 2019). App. 1	
Order Denying 28 U.S.C. § 2255 Motion, <i>Lopez-Castro v. United States</i> , No. 18-21716-Civ-WPD (S.D. Fla. May 29, 2018) App. 2	

Motion for Certificate of Appealability, *Lopez-Castro v. United States*, No. 18-13218 (Jan. 28, 2019) App. 10

Decision of the Court of Appeals for the Eleventh Circuit Denying Reconsideration of Order Denying Motion for Certificate of Appealability, *Lopez-Castro v. United States*, No. 18-13218 (Aug. 8, 2019) App. 55

TABLE OF AUTHORITIES

CASES

<i>Bousley v. United States</i> , 523 U.S. 614 (1998)	10, 11, 15
<i>Cleveland v. United States</i> , 531 U.S. 12 (2000)	16
<i>Davis v. United States</i> , 417 U.S. 333 (1974)	9, 14
<i>Fasulo v. United States</i> , 272 U.S. 620 (1926)	17
<i>Gladney v. Pollard</i> , 799 F.3d 889 (7th Cir. 2015)	13
<i>House v. Bell</i> , 547 U.S. 518 (2006)	5
<i>Johnson v. Alabama</i> , 256 F. 3d 1156 (11th Cir. 2001)	6
<i>McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.</i> , 851 F.3d 1076 (11th Cir. 2017) (<i>en banc</i>) . . .	8, 9
<i>McNally v. United States</i> , 483 U.S. 350 (1987)	4, 13
<i>McQuiggin v. Perkins</i> , 569 U.S. 383 (2013)	4, 11, 12, 13, 14

<i>Murray v. Carrier</i> , 477 U.S. 478 (1986)	5
<i>Pasquantino v. United States</i> , 544 U.S. 349 (2005)	17
<i>Phillips v. United States</i> , 734 F.3d 573 (6th Cir. 2013)	11
<i>Reyes-Requena v. United States</i> , 243 F.3d 893 (5th Cir. 2001)	11
<i>Rivers v. Roadway Express, Inc.</i> , 511 U.S. 298 (1994)	15
<i>Sawyer v. Whitley</i> , 505 U.S. 333 (1992)	16
<i>Schlup v. Delo</i> , 513 U.S. 298 (1995)	13, 15
<i>United States v. Corona</i> , 885 F.2d 766 (11th Cir. 1989)	13
<i>United States v. Morgan</i> , 230 F.3d 1067 (8th Cir. 2000)	12
<i>United States v. Tyler</i> , 732 F.3d 241 (3d Cir. 2013)	11
<i>Vosgien v. Persson</i> , 742 F.3d 1131 (9th Cir. 2014)	12
<i>Welch v. United States</i> , 136 S.Ct. 1257 (2016)	15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V	1
U.S. Const. amend. XIII	9

OTHER AUTHORITIES

18 U.S.C. § 1343	3, 13, 16
18 U.S.C. § 1952	3, 4, 13, 16
18 U.S.C. § 1962	3, 13
18 U.S.C. § 1962(d)	3
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2241	8
28 U.S.C. § 2253(c)	1, 7
28 U.S.C. § 2255	2, 3, 4, 5, 6, 7, 9, 10, 13, 14, 16
Friendly, <i>Is Innocence Irrelevant? Collateral Attack on Criminal Judgments</i> , 38 U. Chi. L. Rev. 142, 160 (1970)	15

(1)

OPINION BELOW

The decision of the Eleventh Circuit, *Lopez-Castro v. United States*, No. 18-13218, is unpublished and is attached as App. 1.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision denying petitioner's motion for certificate of appealability on May 23, 2019, and denied petitioner's timely motion for reconsideration on August 8, 2019. App. 1, 55. Justice Thomas granted the Application to extend the time to file a petition for a writ of certiorari until January 6, 2020. No. 19A465. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS

Petitioner intends to rely upon the following Constitutional and other provisions:

U.S. Const. amend. V (Due Process Clause)

No person shall be ... deprived of life, liberty, or property, without due process of law

28 U.S.C. § 2253(c)

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention

complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

INTRODUCTION

Petitioner was denied post-conviction relief on a first 28 U.S.C. § 2255 motion where the district court concluded that the motion was time barred and procedurally defaulted because it was filed more than one year after finality of the conviction and because petitioner had failed to pursue a direct appeal following his conviction at trial. Relying on Eleventh Circuit precedent, the district court ruled that although petitioner asserted claims that he was convicted of wire fraud and related offenses which, based on supervening precedent, do not constitute federal crimes, petitioner's *legal* innocence of those offenses does not constitute *actual* innocence, and so does not excuse the time bar or procedural default. The

Eleventh Circuit's restriction of the actual innocence doctrine highlights a circuit conflict of fundamental importance to assuring the availability of habeas relief for at least a first petition premised on retroactively-applicable precedent establishing actual innocence.

STATEMENT OF THE CASE

Petitioner was charged by federal indictment with participating in a RICO conspiracy (18 U.S.C. § 1962(d)), substantive violation of RICO (18 U.S.C. § 1962), Travel Act violations (18 U.S.C. § 1952(a)), and wire fraud violations (18 U.S.C. § 1343). The theory of the prosecution was that by participating in wire fraud and Travel Act offenses, petitioner joined a RICO conspiracy that was centered on marijuana distribution by others. Petitioner was not alleged to have any role in the marijuana activity, but instead was charged with accepting employment as a real estate attorney for a member of the conspiracy who purchased land in Florida. Petitioner proceeded to trial on the indictment, was convicted by a jury on wire fraud, Travel Act, RICO conspiracy, and substantive RICO counts. He was sentenced on December 16, 1985, to 25 years imprisonment. Petitioner dismissed his direct appeal, after violating his bond by failing to surrender. Petitioner was re-arrested in 2012, and his § 2255 motion, filed on April 30, 2018, fell well outside the one-year § 2255 filing deadline.

Petitioner argued in his § 2255 motion that his actual innocence, as established by retroactively-

applicable controlling precedent, permitted him, under *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013), to file his motion beyond the one-year time limitation and excused any procedural default otherwise applicable due to his failure to pursue a direct appeal.

Petitioner's actual innocence argument rests on binding, retroactively-effective statutory interpretation decisions rendered after petitioner's conviction became final. The theories of prosecution—that (a) petitioner's use of funds provided by a drug dealer to purchase real estate from an innocent seller constituted illegal distribution of proceeds to a criminal participant under 18 U.S.C. § 1952(a); and (b) depriving the IRS of its right to truthful information necessary to perform its tax record collection duties constituted fraud under federal law—are invalid under supervening decisional law. *See, e.g., McNally v. United States*, 483 U.S. 350 (1987) (holding that only financial fraud was covered by the then-applicable version of the federal fraud statutes). And because the RICO charges were supported only by the defective Travel Act and wire fraud claims, they also are invalid.

Petitioner's § 2255 motion presented three claims for relief: (1) due process violation in the prosecution of a defendant for non-criminal conduct; (2) due process violation in the misinstruction of the jury on the Travel Act and wire fraud counts on which the RICO convictions were premised; and (3) due process violation in imposing sentence based on the materially

erroneous premise of invalid convictions. Petitioner contended that based on the retroactively-effective determination of the scope of application of the relevant statutes, he could demonstrate “actual innocence.” *See House v. Bell*, 547 U.S. 518 (2006) (describing the narrow category of cases meeting the actual innocence standard). And petitioner argued that refusing to remedy a conviction and sentence entered for conduct outside the scope of any criminal statute constitutes a miscarriage of justice and presents “extraordinary circumstances.” *See Murray v. Carrier*, 477 U.S. 478, 496 (1986) (categorizing as “an extraordinary case” the circumstance “where a constitutional violation has probably resulted in the conviction of one who is actually innocent”).

In response to the § 2255 motion, the government argued petitioner could not overcome his procedural default and untimeliness. The government did not contest petitioner’s contentions that the specific allegations made by the government in the indictment and at trial fall outside the scope of the relevant statutes and that but for the wrongful convictions on the Travel Act and wire fraud charges, there would have been no basis to hold petitioner liable for the RICO allegations. Instead, the government argued that since no *new exculpatory evidence* exists, the actual innocence standard cannot be satisfied. Gov’t Resp. to § 2255 Motion at 4 (arguing that petitioner “cannot possibly” show actual innocence without newly

discovered evidence). In reply to the government's response, petitioner explained that actual innocence overcomes default and timeliness objections and that the government's failure to offer a factual basis for a valid conviction supported his entitlement to relief.

The district court's order summarily denying relief, entered within 30 days of the filing of the § 2255 motion and without the benefit of any hearing, relied principally on untimeliness of the motion and petitioner's procedural default as obviating the need for the district judge (a successor judge who had not tried the criminal case) to review the trial record. App. 2–8. In the alternative to untimeliness and default grounds, the district court rejected the § 2255 claims by unduly constricting the scope of the actual innocence doctrine, rejecting petitioner's claims based on retroactively-applicable precedents limiting the scope of the relevant federal criminal statutes as merely “arguing legal, not factual innocence.” App. 7; *see* App. 6 (district court rules that “actual innocence invokes factual not legal innocence. *Johnson v. Alabama*, 256 F. 3d 1156, 1171 (11th Cir. 2001); *Hamm v. U.S.*, 2018 WL 1580359 (11th Cir. 2018). [Petitioner] cites no newly discovered evidence.”).

Petitioner filed a notice of appeal and sought a certificate of appealability, App. 10–54, on whether the district court's ruling that claims premised on retroactively-applicable precedent showing that the conduct of which petitioner was convicted is not

criminal are merely legal, not actual, innocence claims and that such innocence does not excuse a time bar or procedural default as to a first § 2255 motion.

The Eleventh Circuit denied the motion, concluding that no jurist of reason could dispute the district court's decision. App. 1 (petitioner has "failed to make the requisite showing" that "reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000)"). The court of appeals denied petitioner's motion for reconsideration. App. 55.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision to deny a certificate of appealability on the issue of whether innocence premised on a retroactively-applicable judicial construction of a criminal statute constitutes "actual innocence" for purposes of excusing a time bar and procedural default warrants this Court's review. Resolution of divergent circuit views regarding such fundamental defects in criminal convictions would serve multiple interests. Evaluating the extent to which the need for avoidance of the manifest injustice of imprisoning a party who actually committed no crime requires excusing various forms of default or abuse of the writ has led to a split among the circuits and changed positions by the government.

As one Eleventh Circuit judge explained in

discussing the related issue of applying the actual innocence doctrine to avoid violation of the Suspension Clause, habeas review “finds its doctrinal underpinnings in the doctrine of separation of powers and the principle of limited government powers,” barring the use of judicially sanctioned punishment where the legislature does not permit it. *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1122 (11th Cir. 2017) (*en banc*) (Rosenbaum, J., dissenting), *cert. denied sub nom. McCarthan v. Collins*, 138 S.Ct. 502 (2017); *see id.* (“To remedy this affront to habeas corpus, new rules of statutory and constitutional interpretation that reveal detention in violation of the separation of powers or the principle of limited government powers are retroactively applicable on federal collateral review. In other words, these new rules of constitutional and statutory law are retroactively applicable on federal collateral review because the doctrinal underpinnings of habeas corpus—and therefore the Suspension Clause—require that they be.”); *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (“The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.”); *see also United States v. Lanier*, 520 U.S. 259, 267 (1997) (“Federal crimes are defined by Congress, not the courts.”); *McCarthan*, 851 F.3d at 1101–02 (Jordan, J., dissenting in part) (“In my view, the ‘saving clause’ allows a federal prisoner to seek a writ of habeas corpus pursuant to 28 U.S.C. § 2241 if

§ 2255 relief is unavailable to him and a new (and governing) interpretation of the statute of conviction demonstrates that he never committed a crime.”)¹

In briefing its opposition to granting certiorari in *McCarthan*, the Solicitor General made a concession that should govern resolution of this petition: “Statutory challenges of the sort at issue here are also *cognizable on initial motions* under Section 2255, as are preserved claims that the prisoner’s sentence exceeds the maximum authorized by statute.” U.S. Brief, *McCarthan v. Collins*, 2017 WL 4947338 (Oct. 30, 2017) at 22–23 (emphasis added) (citing *United States v. Newbold*, 791 F.3d 455, 460-461 (4th Cir. 2015)); see also U.S. Pet. for Cert., *United States v. Wheeler*, No. 18-420, 2018 WL 4846931, ** 17–18 (Oct. 3, 2018) (“Under Section 2255(a), a prisoner in custody pursuant to a federal sentence of imprisonment may file an initial motion under Section 2255 ‘claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or *laws* of the United States.’ 28 U.S.C. 2255(a) (emphasis added); see *Davis v. United States*, 417 U.S. 333, 345-347 (1974) (relying in part on italicized language to conclude that Section 2255 includes nonconstitutional claims).”). But again, despite parties’

¹ Where a prisoner was not “duly convicted” in accordance with legislative authorization as informed by retroactively-applicable controlling authority, the right to habeas relief also enforces the anti-slavery amendment. U.S. Const., amend. XIII.

expectations regarding at least an initial habeas remedy for the manifest injustice of imprisonment where retroactively-applicable controlling precedent shows the conduct at issue violates no criminal statute, the court of appeals did not find the issue sufficiently debatable to grant a certificate of appealability.²

The court of appeals failed to acknowledge the import of controlling or conflicting decisions addressing the fundamental issues raised by petitioner's case: *Bousley v. United States*, 523 U.S. 614, 624 (1998) (recognizing a fundamental miscarriage of justice exception, based on an intervening retroactively applicable decision restricting the scope of a criminal statute, excuses procedural default; holding that a § 2255 movant may

² Similarly, in *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011) (Gorsuch, J.), the Tenth Circuit sought to adhere to parameters set by Congress, rather than create new impediments to habeas review. *Prost* is not inconsistent with the Solicitor General's concession in *McCarthan*. See *Prost*, 636 F.3d at 597 ("Congress has sought to balance the competing interests of vindicating the potentially innocent and providing a degree of finality to criminal convictions without pursuing either interest blind to the other. No doubt Congress could have struck a different balance than the one it did between these important ends. No doubt it might strike a different balance in the future. But unless and until Congress's currently expressed balance can be said to violate the Constitution, a question (again) not presented in this appeal, it is the job of this court, respecting the principles of judicial restraint, to enforce Congress's expressed purposes, not to replace them with our own.").

establish factual innocence by showing that his conduct does not fall within the scope of a statute as determined under the supervening decision); *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (reaffirming *Bousley* and holding that its manifest injustice exception applies to excuse filing of untimely habeas petition); *United States v. Tyler*, 732 F.3d 241, 252 (3d Cir. 2013) (“conclud[ing] that the intervening change in law again supports Tyler’s claim of actual innocence of violating the investigation-related communication provisions”); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001) (“Because his claim is that he has been imprisoned for non-criminal conduct, as acknowledged by [post-conviction Supreme Court precedent interpreting the scope of relevant statute], he meets the actual innocence prong of our savings clause test.”); *Phillips v. United States*, 734 F.3d 573, 581–83 (6th Cir. 2013) (post-*McQuiggin* decision; “*Bousley* thus properly informs the analysis of an actual innocence claim in the statute of limitations context. ... *Bousley* established an analytical framework for addressing actual innocence claims based upon a claim of legal innocence occasioned by an intervening change in law.” ... “[T]he threshold question, dispositive here, of what Supreme Court or Sixth Circuit precedent defines the [scope of the underlying criminal statute] in such a way that [the defendant] now stands convicted of a crime that the law does not deem criminal. Such a showing is the gravamen of an actual innocence claim.”); *id.* at 582 n.

8 (“The Court declines to accept the government’s suggestion that in *McQuiggin*, the Court meant to limit actual innocence claims to those instances where a petitioner presents new facts, i.e., newly discovered evidence of innocence, and by implication to undermine those cases that have applied an equitable exception in cases where the innocence is occasioned not by new evidence but by an intervening, controlling change in the law as applied to a static set of facts. [N]umerous cases recognize an actual innocence or fundamental miscarriage of justice exception when applied in the context of a claim of legal or statutory actual innocence, albeit through varied analytical approaches.”); *United States v. Morgan*, 230 F.3d 1067, 1070 (8th Cir. 2000) (recognizing that “courts have permitted petitioners collaterally to attack guilty pleas on the basis of intervening decisions modifying the substantive criminal law defining the offense, despite procedural default, if the petitioner makes a showing of actual innocence—that the petitioner did not commit the offense as modified”); *Vosgien v. Persson*, 742 F.3d 1131, 1134, 1136 (9th Cir. 2014) (post-*McQuiggin* decision; “One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime.”; “[Petitioner’s] untimely filing of his federal habeas petition is therefore excused for these counts. On remand, the district court should therefore address on the merits Vosgien’s constitutional claims as to his convictions on

these counts.”) (emphasis added); *see also Gladney v. Pollard*, 799 F.3d 889, 897 (7th Cir. 2015) (acknowledging, post-*Mcquiggin*, “a new question in this circuit, which is whether the *Schlup* [*v. Delo*, 513 U.S. 298 (1995)] actual innocence standard can be satisfied by a change in law rather than new evidence,” and noting authority for an affirmative answer, but failing to reach question where petitioner failed to show an applicable intervening decision).³

The 1984 prosecution of petitioner for RICO violations (18 U.S.C. § 1962) that turned on whether he committed Travel Act (18 U.S.C. § 1952(a)) and wire fraud (18 U.S.C. § 1343) offenses was rendered invalid by supervening, retroactively-applicable authority. *See United States v. Corona*, 885 F.2d 766, 768, 773 (11th Cir. 1989) (decision on review of trial of co-defendants of petitioner; “Two days after the verdicts, the Supreme Court decided *McNally v. United States*, 483 U.S. 350 ... (1987). Pursuant to *McNally*’s limitations on the applicability of the mail fraud statutes, the district court dismissed the mail fraud counts and the mail fraud predicate acts in the RICO count, which resulted in dismissal of the RICO

³ The Solicitor General has acknowledged an entrenched circuit conflict on whether the fundamental defect of conviction of an offense subsequently ruled non-criminal in a retroactively-applicable decision requires habeas relief even where barred by § 2255’s limitation on second or successive petitions. *See Wheeler*, 2018 WL 4846931 at **23–25 (circuit split on Suspension Clause’s application turns on interpretation of § 2255’s text).

count as to [one remaining co-defendant].”; holding as to Travel Act charges that investing or spending money for a drug trafficker does not constitute illegal distribution: “Distribution is not just the disposing of or spending of the proceeds, however, but must involve disbursement to persons who would be entitled to some proceeds from the criminal enterprise.”).

Petitioner’s actual innocence of the offenses of conviction, as established by retroactively-applicable controlling precedent, permitted him to file his motion beyond the § 2255 one-year time limitation and excused any procedural default. *See McQuiggin*, 569 U.S. at 392. Petitioner’s § 2255 motion claimed due process violations in: (1) basing a conviction on non-criminal conduct; (2) misinstructing the jury on Travel Act and wire fraud charges; and (3) sentencing based on materially erroneous premises, i.e., invalid convictions. Petitioner argued that refusing to remedy a conviction and sentence entered for conduct outside the scope of any criminal statute constitutes a miscarriage of justice and presents extraordinary circumstances.

Where a defendant is convicted and punished for an offense that the law does not make criminal, the claim is cognizable under § 2255. *Davis v. United States*, 417 U.S. at 346–47. Reasonable jurists could dispute whether due process compels relief or further proceedings in a first § 2255 motion filed by a defendant who is actually innocent of the offenses for

which he or she is imprisoned. Retroactivity in such cases is necessary because “it is only Congress, and not the courts, which can make conduct criminal.” *Bousley*, 523 U.S. at 620–21. Judicial decisions merely “explai[n] [the Court’s] understanding of what the statute has meant continuously since the date when it became law.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n. 12 (1994). As a result, a narrowing construction to a statute shows that charged conduct was never unlawful because Congress never intended it to be. Separation-of-powers concerns therefore arise when judicial error in applying a statute results in a greater sentence than the legislature has authorized. *See Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (courts are “prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law”).

And with specific reference to the district court’s use of the terms “factual” and “legal” innocence, it appears that the district court was using those concepts in a manner contrary to this Court’s precedents. Factual innocence for purposes of the application of the actual innocence doctrine refers to the absence of evidence on which a properly-instructed jury would convict. *See Schlup v. Delo*, 513 U.S. 298, 327–28 (1995) (citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)). The manifest injustice is no less where a defendant is factually

innocent because his conduct, no matter the proof of it offered by the government, does not violate the law.

In *Davis*, 417 U.S. at 346–47, the Court held that “[t]here can be no room for doubt that [an intervening change in law establishing that the movant has been convicted for a noncriminal act] inherently results in a complete miscarriage of justice and present[s] exceptional circumstances that justify collateral relief under § 2255.” *See also Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) (“miscarriage of justice exception” applies to actual innocence).

Petitioner was indicted on the basis of a fundamental misapplication of the wire fraud statute, 18 U.S.C. § 1343, and the Travel Act, 18 U.S.C. § 1952(a). The theory of prosecution—that a real estate attorney’s travel to facilitate the purchase of real estate had violated fraud and pre-money laundering Travel Act provisions—was unfounded. The prosecution distorted the two statutes: there was no honest-services wire fraud law in 1984 and the Travel Act barred only the distribution of proceeds to criminal participants, not simple real estate investments. Lacking a valid statute on which to prosecute petitioner, the government overextended wire fraud and Travel Act prohibitions to obtain a conviction. *See Cleveland v. United States*, 531 U.S. 12, 22–23, 26, 31 (2000) (18 U.S.C. § 1341 punishes only schemes to deprive victims of their “money or property,” such that the “object of the fraud ... must be ‘[money or] property’

in the victim's hands"; unissued state license to operate video poker machines was not "property," but regulatory in nature); *Pasquantino v. United States*, 544 U.S. 349, 355–57 (2005) (distinguishing true tax evasion fraud from merely concealing information). "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926).

Reasonable jurists could debate whether petitioner, who was innocent of any offense, should be able, in a first habeas petition, to seek redress for the constitutional violations that caused his unjust imprisonment.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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January 2020