IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13218-A

MANUEL LOPEZ-CASTRO,

Petitioner–appellant,

versus

UNITED STATES OF AMERICA,

Respondent–appellee.

Appeals from the United States District Court
for the Southern District of Florida

(May 23, 2019)

ORDER:

To merit a certificate of appealability, appellant must show 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). Because appellant has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

/s/ Britt Grant
UNITED STATES CIRCUIT JUDGE

App. 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 18-21716-CIV-DIMITROULEAS
(84-853-CR-KEHOE)

MANUEL LOPEZ-CASTRO,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

(May 29, 2018)

FINAL JUDGMENT AND ORDER DISMISSING MOTION TO VACATE

WILLIAM P. DIMITOULEAS, District Judge.

THIS CAUSE is before the Court on Movant's (Lopez-Castro) May 1, 2018 Motion to Vacate. [DE-1]. The Court has considered the Government's May 7, 2018 Response [DE-5] and Movant's May 14, 2018 Reply [DE-6]. The Court has reviewed the court files to the extent that they are available and the Pre Sentence Investigation Report (PSIR) conducted in 93-224-CR and finds as follows:

1. In 1984 Lopez-Castro was indicted and charged with Conspiracy RICO, RICO, eleven (11) counts of Violation of the Travel Act and six (6) counts of Wire Fraud [DE-6-2]. Trial commenced on August 5, 1985. On October 7, 1985, Lopez-Castro was found guilty of

RICO Conspiracy, RICO, six (6) counts of Violation of the Travel Act and three (3) counts of Wire Fraud. [DE-6-1, p. 23]. He was acquitted on eight (8) counts. The crimes for which there was a conviction occurred on:

	RICO CONSPIRACY
I	January 1977 until the date of the Indictment
	RICO
II	January 1977 until the date of the Indictment
	TRAVEL ACTS
XI	January 23, 1980 (Racketeering Act 29 [DE-6-2, p.19]
XIII	April 2, 1980 (Racketeering Act 31 [DE-6-2, p.19]
XIV	April 3, 1980 (Racketeering Act 32 [DE-6-2, p. 19]
XVI	June 10, 1980 (Racketeering Act 34 [DE-6-2, p. 20]
XIX	January 19, 1981 (Racketeering Act 37 [DE-6-2, p. 20]
XXII	September 16, 1981(Racketeering Act 40 [DE-6-2, p. 21]
	WIRE FRAUD
XXV	March 26, 1980
XXVI	April 2, 1980

XXVIII June 10, 1980

XXIX January 19, 1981

Predicate Act 25 also charged Lopez-Castro with a Travel Act violation in June, 1979. [DE-6-2, p. 18]. On November 15, 1985, Lopez-Castro's Motion for New Trial was denied.

2. On December 16, 1985, Lopez-Castro was sentenced to twenty-five (25) years in prison;[1] He filed a Notice of Appeal on December 26, 1985. It was dismissed on April 7, 1986. Mandate issued on April 23, 1986. When he failed to voluntarily surrender himself, he became a fugitive. [DE-6-1, p. 26].

93-224-CR

3. On May 14, 1993, he was indicted and charged with Failure to Surrender on January 28, 1986 at the Federal Correctional Institute in Tallahassee to start serving his sentence. [DE-1, in 93-224-CR]. He took up residence in Mexico, but was deported to the United States in February, 2013 [DE-21 in 93-224CR]. On April 15, 2013, Lopez-Castro pled guilty pursuant to a plea agreement. [DE-20 in 93-224-CR]. The plea agreement recognized that he would be eligible for parole. On June 24, 2013, this Court agreed with the joint recommendation of counsel and imposed a five (5) year sentence consecutive to 84-853-CR and 85-146-CR

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[1] Twenty (20) years for RICO Conspiracy and five (5) years consecutive for RICO and the other nine (9) counts. [DE-6-1, p. 25]. He was sentenced to a consecutive two (2) year sentence in 85-146-CR. Lopez-Castro was ordered to surrender to Eglin or Maxwell AFB. A bench warrant was requested on January 30, 1986. His bond was revoked on February 6, 1986.

[DE-29 in 93-224CR]. On October 24, 2013, this Court denied a Motion to Mitigate under Rule 35.. [DE-35 in 93-224-CR].

14-22578-CIV

4. On July 10, 2014, Lopez-Castro filed a Motion to Correct the Sentence in 93-224-CR. [DE-1 in 14-22578-CIV]. On July 6, 2014, the Court directed the Clerk to strike the sentence "The Sentence is imposed pursuant to the Sentencing Reform Act of 1984." [DE-6 in 14-22578-CIV].

18-21716-CIV

5. In this untimely Motion to Vacate, Lopez-Castro first contends that he is actually innocent of all charges. He cites an appeal of a former co-defendant from a subsequent trial after a hung jury: *U.S. v. Corona*, 885 F. 2d 766 (11th Cir. 1989). In that appeal, the Eleventh Circuit found at least two predicate acts had existed prior to the termination of the business enterprise to justify the RICO conviction. *Id.*, at 774. Those Travel Act, predicate acts occurred while the business enterprise was still ongoing, at least until Fernandez' arrest in New Orleans in March, 1981 and probably until December, 1981. Here, sufficient timely Travel Act convictions and predicate acts were found to justify Lopez-Castro's convictions. He contends that the alleged wire fraud and travel act activities were non-criminal. However, even if *McNally*'s[2] later invalidation of Mail Fraud convictions applies to previous Wire Fraud convictions; sufficient Travel Act violations remain to justify the jury's decision and the

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[2] *McNally v. U.S.*, 483 U.S. 350 (1987).

judge's sentence. Lopez-Castro's argument that he was merely an attorney conducting real estate transactions who did not intend to distribute proceeds to criminal participants was apparently rejected by the jury. Second, Lopez-Castro contends that the jury received erroneous jury instructions. Third, he contends he has been denied parole eligibility. Fourth, he complains about consecutive sentences on the substantive counts.

6. This court agrees with the Government's response.

A. First, 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). Lopez-Castro cites no newly discovered evidence. His legal arguments are based on legal authority that is thirty (30) years old. No due diligence has been shown. Lopez-Castro's conclusory allegation does not merit any relief. As indicated above, he fails to explain how the Travel Act convictions are invalid. It was up to the jury to decide whether he was merely acting as a lawyer and receiving a fee for that. Here, there was more than just a normal purchase and sale.

B. Second, Lopez-Castro has procedurally defaulted any complaint about jury instructions, as matters that could have been raised on direct appeal should not be heard on collateral attack. *Lynn v. U.S.*, 365 F. 3d 1225, 1234 (11th Cir. 2004). Moreover, there has been no showing that the instructions were erroneous. The instructions given [DE-6-3, pp. 29-31] substantially conform to the comparable jury instruction found at Eleventh Circuit Pattern Jury Instruction O71.

Additionally, the Corona appeal invalidated only two Travel Act counts[3] and Lopez-Castro was not charged in those counts. Furthermore, Fernandez's fugitive status in 1981 occurred after most, if not all, of Lopez-Castro's substantive and predicate crimes had already occurred. *McNally v. U.S.*, 483 U.S. 350 (1987) found that the Mail Fraud statute was limited in scope to the protection of property rights. Here, there was sufficient evidence to support the Travel Act and Wire Fraud counts. *U.S. v. Lignarado*, 770 F. 2d 971 (11th Cir. 1985). Lopez-Castro's contention is that he is not factually guilty of the crimes because he did not distribute property to someone entitled to proceeds from a criminal enterprise. He argues that his "money laundering" activities were not illegal in 1985. Again, he is arguing legal, not factual innocence.

C. Third, any complaint about a denial of his parole eligibility is not properly before this court on a motion to vacate. After exhausting his administrative remedies, Lopez-Castro's relief could only be through a habeas petition pursuant to 28 U.S.C. § 2241 in the district where he is housed. (E.D. Texas).

D. Fourth, Lopez-Castro received consecutive sentences on more than just the Travel Act and Wire-Fraud counts. No prejudice has been shown. Lopez-Castro also contends that if any of his convictions are invalidated that he is entitled to a de novo sentencing. The Court would normally deny that

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[3] Counts VI and VIII which apparently referred to a Superseding Indictment that was the basis for a later trial against the Coronas, after a hung-jury in the 1985 trial. *U.S. v. Corona*, 804 F. 2d 1568 (11th Cir. 1986) *cert. denied*, 481 U.S. 1017 (1987).

request under the "concurrent sentence doctrine". See, *U.S. v. Fuentes-Jimenez*, 750 F. 2d 1495, 1497 (11th Cir. 1985); *In re: Williams*, 826 F. 3d 1351, 1356 (11th Cir. 2016). However, the Eleventh Circuit may have recently rejected that tool of judicial economy. *See*, *Cazy v. U.S.*, 717 Fed. Appx. 954 (11th Cir. 2017). If so, here, it does not appear that Lopez-Castro has suffered any adverse consequences, monetarily or otherwise, from concurrent sentences on the Wire Fraud counts; there appears to have only been a $25,000 fine on Count One. [DE-6-1, p. 25]. In any event, the Court is familiar with Movant in that in 2013, the Court reviewed a PSIR and imposed a sentence on Lopez-Castro; no reduction in the twenty-five (25) year, parole eligible sentence would likely occur; if anything, the Court could take into account Lopez-Castro's twenty-seven (27) year status as a fugitive. Movants should be careful what they wish for. U.S. v. Hogg, 723 F. 3d 730, 751 (6th Cir. 2013).

E. This petition is time-barred. No basis for equitable tolling has been shown.

Wherefore, Movant's Motion to Vacate [DE-1] is Dismissed as time-barred. Alternatively, it is Denied on the merits. The Court has again reviewed the PSIR and denies any Rule 35 request in this case.

The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of May, 2018.

s/ William P. Dimitouleas
WILLIAM P. DIMITOULEAS

United States District Judge

No. 18-13218-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MANUEL LOPEZ-CASTRO,

Movant/appellant,

v.

UNITED STATES OF AMERICA,

Respondent/appellee.

On Appeal from the United States District Court
for the Southern District of Florida

Appellant's Motion for Certificate of Appealability

Appellant, Manuel Lopez-Castro, through counsel, respectfully moves, pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b), for a certificate of appealability.

A. Jurisdiction.

The district court for the Southern District of Florida had jurisdiction pursuant to 28 U.S.C. § 2255. Appellant Manuel Lopez-Castro filed his § 2255 motion on April 30, 2018. DE:1. The district court denied

relief without a hearing and denied a certificate of appealability. DE:7. This Court has jurisdiction to determine whether to grant a certificate of appealability under 28 U.S.C. § 2253. Appellant is in custody pursuant to a 25-year imprisonment sentence. Crim-DE:369.

B. Statement of Issues for Certificate of Appealability.

Appellant requests a certificate of appealability on the following issues:

> 1. Whether the district court erred in denying 28 U.S.C. § 2255 relief where the court concluded that a defendant is not "actually innocent" even where retroactively-effective precedent shows the defendant was convicted of conduct that does not constitute a crime.
>
> 2. Whether the district court erred in ruling that appellant's wire fraud convictions (for obstructing IRS record-collection functions), Travel Act convictions (for serving as real estate counsel for a drug trafficker who purchased real property), and RICO convictions (for the same alleged fraud and travel conduct) remain valid despite contrary precedent of this Court, where the district court judge, who was not the trial or sentencing judge in the criminal case, failed to conduct an evidentiary hearing or review the trial and sentencing record.

3. Whether the district court erred in concluding that the jury instructions in appellant's case accurately stated governing law where the instructions misstated essential elements of the wire fraud and Travel Act counts, resulting in appellant's conviction for lawful conduct.

4. Whether the district court erroneously found that there was no due process violation and denied the request for an evidentiary hearing where appellant's sentence was premised on invalid convictions.

C. Preliminary Statement and Standard of Review.

The district court erred in denying, without an evidentiary hearing, appellant's 28 U.S.C. § 2255 claims, each of which was grounded in clear violations of appellant's Fifth Amendment due process rights. The district court erred procedurally and substantively, and this Court should grant a certificate of appealability.

Procedural History

The appeal arises from the 1984 prosecution of appellant on an indictment charging RICO conspiracy and substantive violation of RICO (18 U.S.C. § 1962), Travel Act violations (18 U.S.C. § 1952), and wire fraud violations (18 U.S.C. § 1343). Crim-DE:1. The theory of the prosecution was that by participating in wire fraud and Travel Act offenses, appellant joined a RICO conspiracy that was centered on drug distribution by other defendants. Appellant was not alleged to have any role in the drug activity, but instead was charged with acting as counsel for a

member of the conspiracy who purchased real estate in Florida. Crim-DE:1:7. Appellant proceeded to trial on the indictment, was convicted by a jury on multiple counts,[4] and was sentenced, on December 16, 1985, to 25 years imprisonment. Crim-DE:369. Appellant forfeited his right to appeal, violating his bond by failing to surrender to serve the sentence. *See* Crim-DE:439. Appellant was not re-arrested until 2012, and his § 2255 motion, filed on April 30, 2018, fell outside the April 24, 1997, deadline set by the Anti-terrorism and Effective Death Penalty Act of 1996. *See Goodman v. United States*, 151 F.3d 1335 (11th Cir. 1998) (AEDPA one-year deadline is April 24, 1997 for defendants whose convictions were already final).

Appellant argued in his § 2255 motion that his actual innocence of the offenses of conviction, as established by retroactively-applicable controlling precedent, permitted him to file his motion beyond the AEDPA time limitation and excused any procedural default otherwise applicable due to his failure to preserve the arguments on direct appeal. *See* DE:1:10 ("The time bar does not apply to bar this motion because the movant is actually innocent of the offenses under applicable law, *see McQuiggin v. Perkins*, 569 U.S. 383, 392, 133 S.Ct. 1924, 1931 (2013) ... .").[5]

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[4] Appellant was convicted of Count 1 (RICO conspiracy); Count 2 (substantive RICO); Counts 11, 13, 14, 16, 19, and 22 (Travel Act); and Counts 25, 26, 28, 29 (wire fraud). The underlying conduct occurred in 1980 and 1981. Crim-DE:369.

[5] Appellant argued, in the alternative, that as to those claims for which relief may be granted under Fed. R. Crim. P. 35 (1985), the time bar under § 2255 is inapplicable and that to the extent the district court's statutory jurisdiction was exceeded in the imposition of sentence, application of a time bar would be

Appellant's actual innocence argument rests on binding, retroactively-effective substantive statutory interpretation decisions rendered after appellant's conviction became final. The principal theory of appellant's prosecution was that by acting as real estate attorney who represented a drug dealer in the purchase of Florida real estate, appellant violated the Travel Act prohibition against distributing illegal proceeds to a criminal participant and committed wire fraud by conducting these transactions for corporations owned by the trafficker, depriving the IRS of information necessary to fully perform its record collection responsibility. DE:1:13–23.

The prosecution theories—(a) that appellant's use of funds provided to him 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; and (b) that defrauding the government of its right to truthful information necessary to perform its duties constituted fraud under federal fraud statutes, even though no property or economic interest was at stake—were relied on by the district court at the time of trial and sentencing, were erroneously explained in the jury instructions, and formed the basis for all of appellant's convictions, with the RICO charges against him supported at trial only by the Travel Act and wire fraud claims. Appellant was neither charged with nor convicted of any other conduct than the non-criminal conduct charged in Travel Act and wire fraud counts of conviction.

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unconstitutional. DE:1:10.

Appellant's § 2255 motion relied on precedent of this Court and the Supreme Court holding that where a defendant was prosecuted on the basis of conduct that a retroactively-applicable decision holds is not criminal, relief must be granted to remedy the manifest injustice of imprisonment for lawful conduct. *See* DE:1. Appellant 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 materially erroneous premises, consisting of invalid convictions and reliance on parole release statutes not available to appellant.

Appellant's Claim I in his § 2255 motion was that his convictions violate due process and are invalid because, under retroactively-effective precedent, the conduct alleged and proven was not criminal. Appellant asserted that imposition of convictions and sentences on the Travel Act, wire fraud, and RICO offenses violates due process and exceeds federal statutory jurisdiction because: (1) as to wire fraud offenses and predicates, *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), rendered the charged wire fraud conduct—obstructing the record collection function of the IRS, as to which there was no component or allegation of financial fraud—outside the scope of the wire fraud statute in 1985; (2) as to Travel Act allegations, under this Court's precedent established in the years following the finality of appellant's conviction, assisting a criminal in transporting his own

assets for investment or purchase does not violate the 18 U.S.C. § 1952 proscription on the travel for the purpose of distributing criminal proceeds to other participants, and that, under *ex post facto* principles, the enactment of money laundering statutes long after appellant's convictions could not retroactively criminalize his conduct. Appellant explained further that the RICO counts were premised on the invalid theory of Travel Act and wire fraud liability and that there was no remaining viable basis for the RICO counts without the defective substantive counts of conviction. DE:1:4.

With regard to the Travel Act, appellant alleged that the facts established at trial showed that he was an attorney who conducted real estate investment transactions for a client (who was a drug dealer), but failed to show any intent or attempt to distribute proceeds to other criminal participants as required under the statute. DE:1:15–16. And with regard to the wire fraud counts, none of the conduct alleged as to, or committed by, appellant constituted an attempt to defraud under *McNally*—as the trial and sentencing district judge in the criminal case concluded in a post-*McNally* ruling as to co-defendants in appellant's case and as this Court found in the appeal from the co-defendants' conviction at a separate trial conducted after appellant's conviction became final. DE:1:19–22, 24. *See United States v. Corona*, 885 F.2d 766 (11th Cir. 1989) (holding that under *McNally*, the fraud conduct alleged in the indictment was not criminal).

Appellant 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 appellant 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").

Appellant's Claim II asserted that his convictions were infirm due to fundamentally erroneous jury instructions that allowed the jury to convict him of innocent conduct. Appellant argued that the jury instructions were fundamentally erroneous, omitting and misstating essential elements, thereby violating due process by misinstructing the jury as to the elements of the core alleged offenses. Appellant asserted that the instructions permitted the jury to convict him on RICO and other counts on the erroneous theory that his actions—consisting of performing real estate attorney work to facilitate the purchase of property[6]—were unlawful under the Travel Act and wire fraud statute. DE:1:23–25.

Appellant's Claim III was that his sentencing—and 25-year sentence (composed of a 20-year statutory maximum sentence for RICO conspiracy to run consecutive to concurrent 5-year sentences on

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[6] "Fernandez owned a 50-acre Ocala, Florida horse ranch worth $1,000,000, seven beach-front acres including three buildings at Vero Beach, several other properties, and a $90,000 boat, all bought with his drug earnings." *Corona*, 885 F.2d at 769.

the substantive counts)—violate due process because the district court relied on materially erroneous premises as to invalid convictions and an illusory understanding of parole and early-release eligibility provisions of federal law that are inapplicable. DE:1:25–27. Appellant alleged that in imposing sentence, the sentencing judge relied on then-existing statutory requirements for parole consideration. As a result of a later-enacted statute abolishing parole, appellant lost eligibility for parole and his sentence was converted to a non-parolable sentence longer than that contemplated by the sentencing judge. Application of post-sentencing statutory changes in the law render the sentencing decision violative of the Due Process Clause and constitute an *ex post facto* violation.

Second, appellant claimed that the sentencing judge's imposition of consecutive sentences on the multiple counts of conviction resulted from the erroneous convictions on substantive counts as to which appellant is actually innocent even if his conspiracy conviction were not invalidated. DE:1:6–7, 27. Because appellant's consecutive sentences rested on convictions of which he is actually innocent, the sentencing violated due process.

The government argued that appellant could not overcome his procedural default in failing to earlier raise his claims because he had not shown due diligence. DE:5:4, 6. The government's opposition to the motion was premised on procedural grounds, and the government failed to offer any factual basis to sustain the convictions. Nor did the government contest appellant's contentions that the specific allegations made by the government in the indictment

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 appellant liable for the RICO allegations. Instead, the government claimed, wrongly, that it had no access to the trial record, *see* DE:5:1 (claiming erroneously that the criminal docket "reveals no useful information"), and argued that since no new evidence exists, the actual innocence standard cannot be satisfied. DE:5:4 (arguing that appellant "cannot possibly" show actual innocence without newly discovered evidence). The government took the position that the absence of an electronic record on the case meant that the government could not represent its view of the trial evidence offered against appellant. DE:5:5–6 (asserting falsely that there is no "means by which this court can judge the accuracy or lack of accuracy of [appellant's] allegations about what the trial evidence showed"; asserting falsely that "[t]here is no factual record" and no "complete record on appeal," and that the government would have to "try to reproduce the record [in order] to refute" appellant's § 2255 claims).

The government's response failed to address the appellant's challenge to the fundamentally erroneous jury instructions and did not address the merits of the due process violation at sentencing due to reliance on invalid convictions. Instead, the government chastised appellant for having "the audacity to seek an unjustifiable short-cut to relief" on actual innocence and due process claims. DE:5:6.

In reply to the government's response, appellant explained: that actual innocence overcomes default and timeliness objections; that the complete record of

the case was in the Clerk's office; and that the government's failure to acknowledge the record or to even attempt to offer a factual basis for a valid conviction of any of the charges was unwarranted. DE:6:2 (characterizing as "frivolous" the government's argument that it could not address the actual innocence claim because the record was not in an electronic format); *see also* DE:6-1 to 6-3 (attaching criminal docket, indictment, and jury instructions).

The district court's order summarily denying relief was entered within 30 days of the filing of the § 2255 motion and without the benefit of any hearing. DE:7. In denying relief, the district court relied on a series of alternative untimeliness and merits grounds. DE:7:5 ("Dismissed as time-barred. Alternatively, it is Denied on the merits."). The district court concluded:

- that factual innocence, for purposes of the actual innocence doctrine, cannot be shown by retroactively-effective precedent proving that the defendant was convicted for conduct that is not criminal (DE:7:4);
- that a § 2255 movant claiming actual innocence is barred from relief where due diligence is not shown in discovering the invalidity of the conviction (DE:7:4);
- that appellant "fail[ed] to explain how the Travel Act convictions are invalid," DE:7:4;
- that the evidence submitted "to the jury to decide whether [appellant] was merely acting as a lawyer and receiving a fee for that" was in conflict and that the record

showed that "[h]ere, there was more than just a normal purchase and sale" (DE:7:4);

- that there was no showing that the instructions were erroneous where the Travel Act instruction matched Eleventh Circuit Pattern Offense Instruction 71, stating: "The instructions given [DE-6-3, pp. 29-31] substantially conform to the comparable jury instruction found at Eleventh Circuit Pattern Jury Instruction O71." DE:7:4;
- that there was "sufficient evidence to support the Travel Act and Wire Fraud counts," DE:7:4; and
- that appellant was not prejudiced by reliance on invalid convictions at sentencing because the newly-assigned district court judge might sentence more severely (DE:7:5);

The district court did not address the fundamental *McNally* error in the wire fraud instructions. *See* DE:7:4.

Standard of Review

When considering a request for a certificate of appealability to review claims resolved on the merits without an evidentiary hearing, the Court need only determine whether the motion states a facially valid claim that is not conclusively refuted by the record. Thus, the "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it."

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (test for COA is whether jurists of reason could disagree with failure to conduct an evidentiary hearing); *see id.* 537 U.S. at 338 ("We do not require petitioner [whose petition was denied without an evidentiary hearing] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus."). *See Johnson v. Thaler*, 406 Fed.Appx. 882 (5th Cir. 2010) (question for review authorization is whether "jurists of reason could find it debatable whether the district court committed a substantive or procedural error in dismissing his habeas application").

The requirement that *even if the reviewing court, on motion for a certificate of appealability, concludes that an issue appears to be rightly decided below*, the motion must be granted whenever another reasonable judge *could* find resolution of disputed issues or law are not conclusively resolved against the movant, particularly in the absence of the adversarial testing afforded by an evidentiary hearing, shows that the relevant review standard is notably different from ordinary judging. Consideration of the motion for certificate of appealability involves, in this case, consideration of record-affecting procedural rulings, i.e., the critical eye of another judge who might not have so conclusively foreclosed consideration of the totality of the record, rather than determining the question of ultimate relief on, or denial of, the § 2255 motion.

And in reviewing the district court's conclusions on questions of law in this case, no deference is owed to the decision below. *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009) (explaining the denial of relief under 28 U.S.C. § 2255 presents mixed

questions of law and fact calling for *de novo* review of the denial, with underlying factual findings reviewed for clear error). Particularly in the present case, because neither the government nor the district court deemed the trial and sentencing record available (even though the record was available, albeit not in electronic format), no deference is owed to the district court's decision.

D. Request for Certificate of Appealability.

THE MOTION FOR CERTIFICATE OF APPEALABILITY SHOULD BE GRANTED BECAUSE THE DISTRICT COURT'S DENIAL, WITHOUT AN EVIDENTIARY HEARING, OF APPELLANT'S CLAIMS OF DUE PROCESS VIOLATIONS RESULTING IN HIS CONVICTIONS AND 25-YEAR PRISON SENTENCE FOR OFFENSES OF WHICH HE IS ACTUALLY INNOCENT WARRANT APPELLATE REVIEW.

Appellant was entitled to an evidentiary hearing, upon review of the trial and sentencing record, and ultimately relief on his 28 U.S.C. § 2255 motion, where he asserted facially meritorious claims of actual innocence and due process violations that call into question the integrity of the prosecution and the extreme sentence imposed. The record and controlling precedent show that appellant was prosecuted in 1985 for offenses that Congress had not yet made criminal—essentially for the later-created offenses of money laundering and non-financial fraud. The district court's grounds for denial of relief are inconsistent with the manifest injustice doctrine, and

specifically the actual innocence exception to application of procedural default and untimeliness restrictions. The district court's misapplication of the law applicable to actual innocence taints the entire order of denial. The district court additionally erred in misconstruing the jury instructions and the elements of the offenses of conviction and in prejudging the outcome of a resentencing based on events at a subsequent sentencing for bond violation, without consideration of the record, including prior sentencing proceedings, in the criminal case at issue here.

The district court's primary basis for denial of relief was that the § 2255 motion was filed outside the one-year AEDPA limitations period. DE:5 ("This petition is time-barred. No basis for equitable tolling has been shown."). The district court's erroneous construction of the actual innocence doctrine to require a showing of due diligence or equitable tolling was squarely rejected by the Supreme Court. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (the timing of presentation of an actual innocence claim cannot bar consideration of the claim; explaining that the actual innocence gateway flows from the "fundamental miscarriage of justice exception" to the application of procedural default bars and statutes of limitations). Thus, appellant was not required to show any tolling factor, and the government's assertion that the timing of the motion was relevant because there was no complete record to review is simply false. The district court, in contrast to the government, did not directly dispute the existence of a complete record, but ambiguously stated that it had "reviewed the court files to the extent that they are available." DE:7:1 (order making record reference only to portions of the

record submitted with appellant's filings, rather than the hard copy record in the district court clerk's office).

Because the complete record exists and confirms the allegations of the § 2255 motion, the district court's denial of relief on the basis of the absence of equitable tolling or due diligence was unwarranted and reasonable jurists could readily disagree with those legal or factual conclusions by the district court. The record exists and there is no time bar to the application of the manifest injustice exception.

The manifest injustice of maintaining a conviction and sentence where subsequent controlling authority shows the invalidity of the convictions has no time limit. Where a defendant is convicted and punished for an offense that the law does not make criminal, he has a claim that is cognizable under 28 U.S.C. § 2255. *Davis v. United States*, 417 U.S. 333, 346–47 (1974) ("If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief under [28 U.S.C. §] 2255."); *see also Mays v. United States*, 817 F.3d 728, 736 (11th Cir. 2016) (collateral review available where defendant was convicted of nonexistent offense); *accord Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011) ("A petitioner is actually innocent when he was convicted for conduct not prohibited by law.").

1. *The district court erred in denying 28 U.S.C. § 2255 relief where the court concluded that a defendant is not "actually innocent" even where retroactively-effective precedent shows the*

defendant was convicted of conduct that does not constitute a crime.

The precedent on which appellant relied to establish his actual innocence of the offenses in this case was retroactively-effective because it interpretively restricted the scope of application of criminal statutes to conform to the law as enacted by Congress.

> Although this Court has put great emphasis on substantive decisions that place certain conduct, classes of persons, or punishments beyond the legislative power of Congress, the Court has also recognized that some substantive decisions do not impose such restrictions. The clearest example comes from *Bousley* [*v. United States*, 523 U.S. 614 (1998)]. In *Bousley*, the Court was asked to determine what retroactive effect should be given to its decision in *Bailey v. United States*, 516 U.S. 137 ... (1995). *Bailey* considered the "use" prong of 18 U.S.C. § 924(c)(1), which imposes increased penalties on the use of a firearm in relation to certain crimes. The Court held as a matter of statutory interpretation that the "use" prong punishes only "active employment of the firearm" and not mere possession. 516 U.S., at 144 ... .The Court in *Bousley* had no difficulty concluding that *Bailey* was substantive, as it was a decision "holding that a substantive federal criminal statute does not reach certain conduct."

> *Bousley*, *supra*, at 620 ...; *see Schriro* [*v. Summerlin*, 542 U.S. 348, 354 (2004)] ("A decision that modifies the elements of an offense is normally substantive rather than procedural"). The Court reached that conclusion even though Congress could (and later did) reverse *Bailey* by amending the statute to cover possession as well as use.

Welch v. United States, 136 S.Ct. 1257, 1267 (2016). In *Bousley*, the Supreme Court held that the bar to retroactive application of new rules on collateral review "is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." 523 U.S. at 620.

Retroactivity in such cases is necessary because in "it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 523 U.S. at 620–21. Under this system, 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); accord *Bousley*, 523 U.S. at 625 (Stevens, J., concurring in part and dissenting in part) (*Bailey* "did not change the law" but "merely explained what § 924(c) had meant ever since the statute was enacted"). 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*, 136 S.Ct. at 1267 ("decisions that interpret a statute are substantive if and when they meet the

normal criteria for a substantive rule: when they 'alte[r] the range of conduct or the class of persons that the law punishes'") (quoting *Schriro*, 542 U.S. at 353); *id* at 1268 (recognizing that "a decision that saves a vague statute by adopting a limiting construction is substantive, so anyone who falls outside the limiting construction can use that decision to seek relief on collateral review"); *Schriro*, 542 U.S. at 351–52

(such decisions apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal or faces a punishment that the law cannot impose upon him).

Legal Standards Governing Claims of Actual Innocence.

The district court erroneously concluded that actual innocence premised on retroactively-effective authority holding that the conduct of which the defendant was convicted is not criminal does not meet the test for factual innocence, as opposed to mere legal innocence. This Court has not previously rejected a claim of actual innocence on the grounds asserted by the district court. *See*, *e.g.*, *Johnson v. Fla. Dep't of Corr.*, 513 F.3d 1328, 1334 n. 10 (11th Cir. 2008) (assuming, without reaching the question, that under *Bousley* "a federal habeas petitioner should be permitted the opportunity to raise an actual innocence claim based on a new interpretation of the statute" of conviction). 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 case law. 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 of a crime.[7] It does not exclude the situation where a defendant is factually innocent because his conduct, no matter how construed by the government, does not violate the law. Such a defendant is also factually innocent, and not merely legally innocent—where the latter term relates solely to the sufficiency of evidence presented at a particular trial.

In *Davis v. United States*, 417 U.S. 333, 346–47 (1974), the Supreme 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." "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (quoting *McCleskey v. Zant*, 499 U.S. 467, 494, 502 (1991) (addressing the exercise of "equitable discretion to correct a miscarriage of justice" and application of the doctrine where conviction of an actually-innocent defendant has "probably resulted")); *see also Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("where a constitutional violation has probably resulted in the conviction of one who is actually

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[7] To establish actual innocence, a petitioner must demonstrate that, "'in light of all the evidence,'" it is "more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995) (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 160 (1970)).

innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"); *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) ("miscarriage of justice exception" applies to actual innocence); *cf. Herrera v. Collins*, 506 U.S. 390, 446 (1993) (Blackmun, J., dissenting) ("The execution of a person who can show that he is innocent comes perilously close to simple murder.").

In a case that does not implicate new evidence or review of a state court judgment, the Supreme Court's holding that "[t]he prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence," *see Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), applies where the movant makes such a showing through the application of retroactively-effective substantive rulings barring the imposition of criminal punishment for the defendant's conduct. "In *Bousley* ..., we held, in the context of [28 U.S.C.] § 2255, that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review." *McQuiggin v. Perkins*, 569 U.S. at 393 (explaining that the actual innocence analysis in *Bousley* falls within the scope of the manifest injustice doctrine).

Nor is the circumstance of a guilty plea in *Bousley* in any way helpful to the government's attempt to limit the application of the actual innocence doctrine, because even more so than with guilty pleas, "it is feasible to make an accurate assessment of "actual innocence" when a trial has been had. *See Bousley*, 523 U.S. at 630 (Scalia, J., dissenting).

Appellant was indicted on the basis of fundamental errors in the application of the wire fraud

statute, 18 U.S.C. § 1343, and the Travel Act, 18 U.S.C. § 1952(a). The theory of prosecution was that by facilitating the spending of money belonging to a drug trafficker for the purpose of purchasing real estate, appellant had traveled with the intent to distribute illegal proceeds and had defrauded the Internal Revenue Service's right to obtain correct information regarding taxpayers. The government distorted the two statutes because at the time of the conduct at issue, there was no money laundering statute and no honest services wire fraud offense. Lacking a valid statute on which to prosecute appellant, a lawyer who provided assistance to a drug dealer in regard to investments and corporate entities, the government simply overextended wire fraud and travel prohibitions to obtain a conviction. Because intervening case law—including by this Court in a subsequent trial of appellant's co-defendants—establishes that the conduct at issue did not violate federal law and that the conviction and lengthy imprisonment of someone who is actually innocent of charged conduct constitutes a manifest injustice, relief is warranted under § 2255.

Travel Act (Counts XI to XXII). Appellant was charged under 18 U.S.C. § 1952(a)(1) with travel and use of wire transmissions "with intent to ... distribute the proceeds of any unlawful activity." As to appellant, this was described in the indictment as "racketeering activity." The indictment charged as a crime, and the jury instructions confirmed the criminal allegation, that appellant acted "with the intent to distribute the proceeds of an un awful activity" ... "and thereafter ... did perform and cause to be performed acts to distribute the proceeds of the aforementioned unlawful activity." DE:6-2:9. The theory of the charge

was that by helping a criminal transact his purchases with proceeds, appellant *distributed* the funds. But the indictment and jury instructions misapprehended the concept of distribution liability under the Travel Act (which requires distribution to another criminal participant) and the reasons why Congress needed in subsequent years to enact the various provisions of the money laundering statute.

The government failed to establish a violation of the Travel Act, 18 U.S.C. § 1952(a)(1)(proscribing travel in interstate commerce with the intent to distribute the proceeds of an unlawful activity), where there was no proof that appellant distributed the proceeds of unlawful activity to a criminal conspirator; instead, he simply effectuated real estate transactions for a person later arrested for drug trafficking.

In the appeal pursued by two of appellant's co-defendants, *United States v. Corona*, 885 F.2d 766 (11th Cir. 1989), this Court recognized that investing or spending money for a drug trafficker does not constitute illegal distribution under the Travel Act: "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.***" *Id.* at 773 (emphasis added). In the present case, the unlawful proceeds had already been distributed to all of the conspirators *before* any real estate purchase was made by the trafficker for his own benefit.

Further, this Court explained in *Corona* that distribution for purposes of the Travel Act does not encompass the purchase and sale of goods at market prices, as engaged in by appellant here:

> In *United States v. Cole*, 704 F.2d 554, 558 (11th Cir. 1983), this Court employed the definition of "distribution" given in *United States v. Lightfoot*, 506 F.2d 238 (D.C. Cir. 1974). *Lightfoot* explained:
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> > [T]he word "distribute" carries a connotation of distribution of illegal proceeds to persons in organized crime conspiracies. Certainly the person receiving them must be entitled to them for reasons other than normal and otherwise lawful purchase and sale of goods at market prices.
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> *Id.* at 242. The court in *Lightfoot* held that a participant in a prostitution ring did not "distribute" proceeds of the unlawful activity when he crossed into another state and purchased a car from a dealer having no knowledge of the illegal activity. The court noted, however, that it would have faced "a very different case if defendant had bought the car during interstate travel and given it to one of his prostitutes as compensation." *Id.*

885 F.2d at 773.

Appellant, unlike his codefendant in *Corona* did not receive a percentage of the ownership of the real estate, thereby entitling co-defendant Corona to a share of the proceeds "for reasons other than normal and otherwise lawful purchase and sale of goods at market prices." *Corona*, 885 F.2d at 773 (quoting *Lightfoot*, 506 F.2d at 242; *Cole*, 704 F.2d at 558). As

this Court recognized, Corona was the *recipient* of the purchase; as such, the original trial judge found that Corona was responsible under 18 U.S.C. § 2 as a principal in the distribution of proceeds. *Corona,* 885 F.2d at 733. Appellant, however, was not such a recipient, nor was there any other criminal participant who received any funds *distributed* by action of Lopez-Castro.[8]

In contrast to Ray Corona, appellant was *not* the recipient of any of the property he purchased. Rather, he was simply purchasing property for another, *after* the proceeds of unlawful activity had already been distributed to all of the criminal conspirators. Importantly, appellant – unlike Corona – received merely a normal, non-bogus fee for his services. Moreover, the purchases by appellant were made in the course of normal market transactions.

As the D.C. Circuit explained in the *Lightfoot* decision on which this Court relied, "The word

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[8] The Travel Act "was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing *illegal* activities located in another." *Rewis v. United States*, 401 U.S. 808, 811 (1971) (emphasis added). Under the Travel Act, distribution of proceeds requires something more than merely transferring proceeds and investing them—it requires a divestment of funds, travel for the purpose of turning over funds to another criminal participant, rather than just spending funds or investing them. A later federal statute was enacted to cover the conduct appellant was accused of: Under 18 U.S.C. § 1956(a)(2)(A), "[w]hoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds ... to a place in the United States from or through a place outside the United States" with the intent to conceal criminality is guilty of money laundering. But the later-enacted money laundering provisions do not apply to the charges in this case.

'distribute' simply does not encompass the concept of buying an article in the normal course of trade." *United States v. Lightfoot*, 506 F.2d 238, 241 (D.C. Cir. 1974). Instead, "the word 'distribute' carries a connotation of distribution of illegal proceeds *to persons in organized crime conspiracies*. Certainly the person receiving them must be entitled to them for reasons other than normal and otherwise lawful purchase and sale of goods at market Prices." *Id.* (emphasis added); *see id.* at 242 (conviction invalid where "government's case on this score that the funds with which defendant paid for the Cadillac were derived from prostitution—one of the organized crime offenses specifically referred to in the statute—and, hence, that his purchase represented 'distribut[ing] the proceeds of [an] unlawful activity'"); *see*, *e.g.*, *Abuelhawa v. United States*, 129 S.Ct. 2102 (2009) (rejecting expansive government's interpretation of facilitation of offense); *United States v. Lopez-Vanegas*, 493 F.3d 1305, 1313 (11th Cir. 2007) (where "Congress has shown it is capable of addressing acts involving controlled substances occurring outside of the United States," but chose not to do so, it is impermissible to read a further extraterritorial application into a statute).

Wire fraud (Counts XXV to XXX). The government neither alleged nor proved wire fraud in violation of 18 U.S.C. § 1343. Counts XXV to XXX of the indictment, charging that the defendants "impeded" the agencies' "collection of data and reports" of specified currency transactions and transportation of currency, fail to set forth an offense under 18 U.S.C. § 1343. The indictment provides that is an offense to "defraud the United States and agencies thereof, the United States Customs Service and the Internal

Revenue Service, by impairing, obstructing and defeating its lawful governmental functions of the collection of data and reports of domestic currency transactions." Contrary to the indictment and the jury instructions, an individual's mere failure to provide information to U.S. Customs or the IRS does not constitute "obtaining money or property" from those agencies within the meaning of the wire fraud statute, 18 U.S.C. § 1343.

In *Cleveland v. United States*, 531 U.S. 12, 26 (2000), the Supreme Court ruled that 18 U.S.C. § 1343 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." Applying this definition to an unissued state license to operate video poker machines, the Supreme Court concluded that the state's interest was not "property," but regulatory in nature. *Id.*, 531 U.S. at 22–23. The Supreme Court stressed additionally that the government had not alleged that defendant Carl Cleveland had defrauded the state "of any money to which the State was entitled by law." *Id.* at 22 ("Tellingly, as to the character of Louisiana's stake in its video poker licenses, the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law."); s*ee also Pasquantino v. United States*, 544 U.S. 349, 355–57 & n.2 (2005)(definition of property adopted in *Cleveland* applies to the wire fraud statute, since "we have construed identical language in the wire and mail fraud statutes *in pari materia*").

The *Pasquantino* Court distinguished a true tax evasion fraud from merely concealing information. The Supreme Court held that the right to tax revenue

is property within the meaning of § 1343, in the context of defendant's smuggling of liquor across the border and failure to declare the liquor on customs forms, depriving Canada of the right to taxes – ***but there was no such allegation or proof in the present case***. 544 U.S. at 355–57 ("Petitioners' tax evasion deprived Canada of that money, inflicting an economic injury no less than had they embezzled funds from the Canadian treasury. The object of petitioners' scheme was to deprive Canada of money legally due, and their scheme thereby had as its object the deprivation of Canada's 'property.'"; "The Government alleged and proved that petitioners' scheme aimed at depriving Canada of money to which it was entitled by law. ... *Cleveland* is therefore consistent with our conclusion that Canada's entitlement is 'property' as that word is used in the wire fraud statute.").

The indictment in the present case alleges "a scheme to defraud" but fails to specify that the object of the scheme was to deprive the United States or its agencies of its "money or property." As in *Cleveland*, the indictment notably does *not* allege that appellant had defrauded the U.S. or its agencies of "any money [or property] to which it was entitled by law." 531 U.S. at 22. Moreover, as in *Cleveland*, where the provision of inaccurate information did not constitute a scheme to defraud, so too, here, the mere failure to disclose information does not amount to wire fraud. *See United States v. Sadler*, 750 F.2d 585, 591 (6th Cir. 2014)(Section 1343 is "'limited in scope to the protection of *property rights*,' and the ethereal right to accurate information doesn't fit that description. *McNally*, 483 U.S. at 360 ... (emphasis added). Nor can it plausibly be said that the right to accurate information amounts to an interest that 'has long been

recognized as property.' *Cleveland*, 531 U.S. at 23, 121 S.Ct. 365 (internal quotation marks omitted)").

To interpret the statute more broadly, the Supreme Court in *Cleveland* concluded, would "invite ... a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. Similarly, in appellant's case, finding that the mere failure to report regulatory information constitutes a deprivation of money or property "would subject to federal [wire] fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* As the Supreme Court has made clear, "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359–60. In *McNally*, the Supreme Court held that § 1341 was designed only to protect people from schemes to deprive them fraudulently of their money or property. 483 U.S. at 360. In holding that the fraud conviction in *McNally* was invalid, the Supreme Court further pointed out that, "as the action comes to us, *there was no charge and the jury was not required to find* that the Commonwealth itself was defrauded of any money or property." *Id.* (emphasis added). [9] As in

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[9] Following *McNally*, Congress enacted 18 U.S.C. § 1346, which defined the term "scheme or artifice to defraud" to include a scheme or artifice to deprive another of the intangible right of honest services. The Supreme Court held in *Skilling v. United States*, 130 S.Ct. 2896 (2010); *Black v. United States*, 130 S.Ct. 2963 (2010); and *Weyhrauch v. United States*, 130 S.Ct. 2971 (2010), that the "honest service" provision of 18 U.S.C. 1346 is unconstitutionally vague. In *Skilling*, the Supreme Court ruled that 1346 criminalizes only schemes to defraud the public that involve bribes and kickbacks. "Reading the statute to proscribe a

McNally, there was no charge against appellant, nor was the jury instructed to find, that the government or any government agency was defrauded of money or property. In these circumstances, appellant's wire fraud conviction is infirm. *See id.* ("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). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.").

"[T]his circuit has made it clear that 'a decision which determines that Congress never intended certain conduct to fall within the proscription of a criminal statute must necessarily be retroactive.'" *Lomelo v. United States*, 891 F.2d 1512, 1515 n.8 (11th Cir. 1990) (citing *Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989)); *United States v. Elkins*, 885 F.2d 775, 781 (11th Cir. 1989). There can be no wire fraud where, as here, appellant was neither alleged nor proved to have deprived or intended to deprive the government or government agency of money or property. *See United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014).

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wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes only the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 408-09.

Before 1987, numerous courts had interpreted the fraud statute broadly to affirm convictions involving schemes to defraud victims of all kinds of intangible rights, including a right to privacy and honest elections. *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358 (2010) (general understanding of "honest services fraud" as of 1988); *Neder v. United States*, 527 U.S. 1, 22 (1999) ("fraud" as understood in 1872).

In *McNally*, the Supreme Court corrected this judicially-created expanding universe of intangible-right protections and limited the fraud statutes' scope to rights that sound in property law. *See McNally*, 483 U.S. at 360, 107 S.Ct. 2875. Congress responded to *McNally* in 1988, but even then its response was limited. Instead of reinstating the universe of previously protected intangible rights, it embraced just one of them: "the intangible right of honest services," which protects citizens from public-official corruption. 18 U.S.C. § 1346. *See United States v. Poirier,* 321 F.3d 1024 (11th Cir. 2003)(affirming wire fraud conviction based on scheme to defraud a county by taking money and property from county—confidential business information pertaining to competitive bidding process—and depriving county of co-defendant's honest services; breach of duty in disclosing confidential records; confidential business information long recognized as property, unlike appellant's alleged conduct, which consisted of withholding information from a regulatory agency; no recognition that such information was "property" of the government, but instead was sought pursuant to a regulatory process).

Poirier relied on *Carpenter v. United States*, 484 U.S. 19 (1987), in which the Supreme Court had

affirmed wire and mail fraud convictions based on newspaper employee's pre-publication disclosure of confidential business information concerning securities transactions; Court concluded in *Carpenter* that the confidential business information in the stories prior to publication was "property"—the right to exclusive use of the information, 484 U.S. at 26–27—protected by the wire and mail fraud statutes. *Poirier* and *Carpenter* are wholly unlike appellant's case, which does not involve the disclosure of confidential information, but merely failing to disclose or report information to regulatory agencies. Confidential business information, as this Court recognized in *Carpenter,* and *Poirier*, "has long been recognized as property." 321 F.3d at 1030 (quoting *Carpenter*, 484 U.S. at 26). This does not pertain to the information in appellant's case, which did not represent "money or property in the government's hands," as required to constitute wire fraud. *Cleveland*, 531 U.S. at 26.

Cases interpreting the mail fraud statute are directly relevant to interpretation of the wire fraud statute since the two are worded almost identically and are, therefore, "analyzed in the same way." *United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996). The Supreme Court has repeatedly articulated the rule of construction that "when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60. In particular, the Supreme Court has instructed that this rule of lenity is an "interpretive guide [that] is especially appropriate in construing § 1341 [and § 1343] because, as this case demonstrates, mail [or wire] fraud is a predicate offense under ... the money laundering

statute." *Cleveland*, 531 U.S. at 25 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971) (Travel Act case)) (citations omitted).

In *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002), the defendant pled guilty to a single count of conspiracy to violate the criminal Rico statute, based upon a predicate mail fraud violation for "misrepresentations in license applications he mailed to the Florida Division of Alcoholic Beverages & Tobacco." Relying on *Cleveland v. United States*, 531 U.S. 12, Peter argued in a coram nobis petition that the misrepresentations alleged in his indictment to which he pled guilty pertained solely to non-property fraud and therefore did not constitute a crime under *Bousley v. United States*, 523 U.S. 614 (1998). This Court found that the defendant's conduct was never a crime and that relief must be granted despite the guilty plea and the waiver of 28 U.S.C. § 2255 remedies.

Pursuant to *Peter*, the law recognizes that there must be a vehicle to correct errors of this most fundamental character. The question for the *Peter* Court was whether the "error comprised by a district court's acceptance of his plea was of such a 'fundamental character' as to have the proceeding itself irregular and invalid." *Peter*, 310 F.3d at 712. In granting the writ, this Court in *Peter* held that the error was so fundamental as to be "jurisdictional" in the sense that the allegations, even if proven true, did not constitute a crime and relief was required to remedy the manifest injustice.

Governing retroactively-applicable precedent establishes that appellant was charged with and convicted of non-offenses. His continued imprisonment

on a 25-year sentence constitutes a manifest injustice due to his actual innocence of the Travel Act and wire fraud offenses which formed the basis for his conviction on RICO charges. Reasonable jurists could disagree with the district court's decision that the § 2255 motion was time-barred, that equitable tolling analysis precluded relief, and that his innocence of the offense was other than factual. Hence, the Court should grant a certificate of appealability.

2. *The district court erred in ruling that appellant's wire fraud convictions (for obstructing IRS record-collection functions), Travel Act convictions (for serving as real estate counsel for a drug trafficker who purchased real property), and RICO convictions (for the same alleged fraud and travel conduct) remain valid despite contrary precedent of this Court, where the district court judge, who was not the trial or sentencing judge in the criminal case, failed to conduct an evidentiary hearing or review the trial and sentencing record.*

The district court did not dispute that appellant was wrongly convicted of wire fraud in light of *McNally*. But the district court asserted that there was a record basis for finding appellant committed Travel Act offenses. Reasonable jurists could disagree with the district court's merits conclusion for both legal and factual reasons. First, the district court, asserting that it did not have access to the complete trial record, relied solely on the indictment, docket sheet, and transcript of jury instructions in the criminal case. *See* DE:7:1. Despite failing to review any of the evidentiary record in the case, the district

court asserted that appellant could not be actually innocent of the Travel Act offenses because "[i]t was up to the jury to decide whether he was merely acting as a lawyer and receiving a fee for that. Here, there was more than just a normal purchase and sale." DE:7:4.

The district court errs factually in that there was no allegation that the defendant had distributed criminal proceeds to himself, as implied by the court's reference to receipt of a fee. Attorney fee payments were not part of the prosecution, either in terms of proof or pleading. Second, the government did not factually claim at trial that the defendant had ever sought or been paid more than a standard attorney fee for real estate transactions. Thus, consideration of the record as a whole would still leave the appellant in a position of actual innocence of the charged offenses, which related to arms-length purchases of real property. Consequently, when the district court refers to "more than just a normal purchase and sale," DE:7:4, if the court was referring to the charged conduct—buying real estate—there is no record support for the assertion. All of the real estate purchases were from innocent sellers, according to the undisputed evidence.

To the extent that the district court was hypothesizing evidence in the record without a review of the transcripts, reasonable jurists could dispute that means of resolving (erroneously) a § 2255 motion. Appellant correctly related the indicted theory and evidentiary presentation by the government at trial, and the hypothecation of other evidence at odds with the facts would not be a basis to deny relief. In addition, the district court's hypothesis-based approach is inconsistent with governing law. *See Aron*

v. United States, 291 F.3d 708, 715 n.6 (11th Cir. 2002) ("If the [movant's] allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the [movant] must offer proof."). The district court cannot properly avoid an accurate development of the record by hypothesizing facts that are not part of, or which contradict, existing record facts.

An evidentiary hearing on the § 2255 claim is required unless there is conclusive—and hence uncontradicted—proof in the files and records of the case showing that the claim cannot be established. "Unless the [§ 2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court ***shall*** . . . grant a prompt hearing thereon." 28 U.S.C. § 2255(b) (emphasis added); *see also Raines v. United States*, 423 F.2d 526, 529 (4th Cir. 1970) ("Unless it is clear . . . that the prisoner is entitled to no relief, the statute makes a hearing mandatory."). The movant is "*not* required to allege facts in his petition that would have been equivalent to the type of proof that one would expect in an evidentiary hearing." *Price v. Allen*, 679 F.3d 1315, 1326 n. 9 (11th Cir. 2012) (emphasis added).

The Rules Governing § 2255 Proceedings make clear that statutory language requiring a hearing absent conclusive refutation of the claim by the record is intended to incorporate the standards governing evidentiary hearings in habeas corpus cases stated in *Townsend v. Sain*, 372 U.S. 293, 312 (1963). *See* Advisory Committee Notes to Rule 8, Rules Governing § 2255 Proceedings (incorporating Advisory Committee

Notes to Rule 8 of the Rules Governing § 2254 Proceedings).

In *Townsend*, the Supreme Court held that the district court must hold an evidentiary hearing if: (1) the prisoner alleges facts that, if true, would entitle him to relief; and (2) the relevant facts have not yet been reliably found after a full and fair hearing. *Id.*, 372 U.S. at 312–13. *Actual proof of those facts alleged in the motion is not required in order to demonstrate entitlement to a hearing*. *Aron*, 291 F.3d at 715 n. 6. Once the movant has alleged facts which, if true, would entitled him to relief, a hearing is required.

Thus, unless the relevant facts have been *reliably* found at a full and fair hearing and those facts conclusively show that the movant is not entitled to relief, a hearing is required under § 2255. *See Fontaine v. United States*, 411 U.S. 213, 215 (1973) (relying upon § 2255's language to reverse summary dismissal and remand for a hearing because the record of the case did not "'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under § 2255"); *Aron*, 219 F.3d at 715 n.6 ("If the [movant's] allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the [movant] must offer proof."); *Arredondo v. United States*, 178 F.3d 778, 782, 788–89 (6th Cir. 1999) (concluding a hearing was required because the movant's allegations were not "'contradicted by the record, inherently incredible, or conclusions rather than statements of fact"'). For that reason, a hearing is generally required if the motion presents a colorable claim that arises from matters outside the record. *See*

United States v. Magini, 973 F.2d 261, 264 (4th Cir. 1992) ("When a colorable . . . claim is presented, and where material facts are in dispute involving inconsistencies beyond the record, a hearing is necessary.").

Given all of these circumstances, the record in this case did not "conclusively show that the prisoner is entitled to no relief" on his facially meritorious claims of actual innocence and due process violations; consequently, a hearing was required. 28 U.S.C. § 2255(b).

3. *The district court erred in concluding that the jury instructions in appellant's case accurately stated governing law where the instructions misstated essential elements of the wire fraud and Travel Act counts, resulting in appellant's conviction for lawful conduct.*

The trial court erroneously instructed the jury as to the elements of offenses under the Travel Act and the wire fraud statute and thereby caused the jury to return a guilty verdict on those counts as well as the RICO counts where the verdict was premised on a mistaken understanding of the scope of the Travel Act to include assisting in conveying funds for real estate purchases made by a drug trafficker and a mistaken understanding of the scope of the wire fraud statute as prohibiting conduct that interferes with record collection as opposed to interests in property. The jury was not required to find the requisite elements of the offenses, including the specific intent components of the omitted elements, thereby undermining the validity of the convictions.

Nor was there any evidence to show the movant's commission of any other form of charged criminal conduct as it pertains to the RICO charges. The district court's failure to address the *McNally*-violative wire fraud instructions and the court's misinterpretation of the instructions given on the Travel Act counts present issues about which reasonable jurists could disagree.

With regard to the void wire fraud theory on which the jury was instructed, it is important to note that the original trial judge in the criminal case, in proceedings subsequent to the finality of appellant's conviction, recognized the error and dismissed the fraud charges against appellant's co-defendants. *See Corona*, 885 F.2d at 767. The original judge recognized that permitting the case to go to the jury on a theory of non-property fraud was a fundamental error. *See also United States v. Shotts*, 145 F.3d 1289, 1295-96 (11th Cir. 1998) (business license not "property" protected by fraud statutes); *United States v. Conover*, 845 F.2d 266, 271 (11th Cir. 1988), *superseded by*, 18 U.S.C. § 1346 ("detriment to one's employer" not property right protected by fraud statutes). *See also United States v. Henry*, 29 F.3d 112, 113 (3d Cir. 1994) (interest in fair bidding opportunity not property protected by fraud statutes); *United States v. Slay*, 858 F.2d 1310, 1316 (8th Cir. 1988) (withholding information from a governmental entity is insufficient to uphold a mail fraud conviction: "Withholding valuable information from the City is not the same thing as depriving the City of its property, and only the latter conduct violates the mail fraud statutes."); *United States v. Dadanian,* 856 F.2d 1391 (9th Cir. 1988) (failure to supply property element renders indictment invalid); *United States v. Lance*, 848 F.2d 1497 (10th Cir. 1988)

(paying kickbacks does not violate the "property" requirement); *Lomelo v. United States*, 891 F.2d 1512, 1516 (11th Cir. 1990) (scheme to defraud must result in loss of money or property).

With regard to the Travel Act instructions, the jury instructions permitted conviction on the theory of mere distribution of tainted funds, rather than distribution to a criminal participant as is clearly required under this Court's decision as to the Corona co-defendants. *United States v. Corona*, 885 F.2d at 768 ("Two days after the verdicts, the Supreme Court decided *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (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 count as to Rafael, but not as to Ray.").

The district court erroneously concluded that the Travel Act instructions did not run afoul of the *Corona* decision, because they were consistent with Eleventh Circuit Pattern Offense Instruction 71. DE:7:4. But the pattern instruction to which the district court refers does not address the subsection of the Travel Act under which appellant was convicted and instead relates solely to travel to "promote" a criminal enterprise, an offense with which appellant was never charged. *See* 11th Cir. Pattern Inst., Offense Inst. 71 (requiring proof, inter alia, that "Defendant traveled with the specific intent to promote, manage, establish or carry on an unlawful activity").

Because the district court's sole basis for rejecting the merits of the jury instruction claim was

premised on an erroneous reading of the Travel Act offense charged in this case, and because the district court offered no justification for the *McNally*-violative instruction on the wire fraud counts, reasonable jurists could dispute the district court's denial of the jury instruction claim.

4. *The district court erroneously found that there was no due process violation and denied the request for an evidentiary hearing where appellant's sentence was premised on invalid convictions.*

Appellant's allegations of a due process violation in the imposition of sentence based at least in part on convictions for offenses of which he was actually innocent was erroneously denied by the § 2255 judge on the theory that the judge might not impose a different sentence at resentencing (or might impose a more severe sentence). *See* DE:7:5 (court states: "Movants should be careful what they wish for."). But given that the district court recognized the apparent unlawfulness of appellant's four convictions for wire fraud, and erroneously denied relief as to those and the remaining convictions, the court's foreclosure of the issue of relief by asserting that its familiarity with the movant's bond violation case could dispose the court to impose more than a 25-year sentence was at least premature in the absence of an evidentiary hearing at which appellant would have the opportunity to show that the district court's prejudgment of the matter was incorrect.

Accordingly, appellant was entitled to a hearing on the § 2255 motion, and the denial of relief with a hearing contravened settled law. Thus, the district court's decision to require proof before any hearing of

the prejudice from the due process violation was legally erroneous. Appellant would have proven that prejudice notwithstanding whether the judge assigned to the case for purposes of resentencing had a negative view of the appellant from his prosecution in another case.

Appellant's claim that he should be resentenced so that his sentence rests on factually accurate grounds and without the impact of invalid convictions is one about which reasonable jurists could therefore disagree. A sentencing court cannot rely on false material assumptions without violating the Due Process Clause. *See United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Baylin*, 696 F.2d 1030 (3d Cir. 1982); *United States v. Tobias*, 662 F.2d 381 (5th Cir. 1981); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976); *United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973); *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971); *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970). But the "false assumptions" in each of those cases related to a material fact, not a prediction about some future event. *See Tucker*, 404 U.S. at 447 (defendant's prior criminal record); *Townsend*, 334 U.S. at 740-41 (defendant's prior criminal record); Baylin, 696 F.2d at 1033-35 (defendant's prior "illicit activities"); *Tobias*, 662 F.2d at 388 (defendant's intent to manufacture large quantity of PCP; sentencing court may not rely on "incorrect assumptions from the evidence"); *Stein*, 544 F.2d at 100 (defendant's attempt to "fix" prior sentence and defendant's feigned suicide to avoid going to jail); *Espinoza*, 481 F.2d at 555 (defendant's "bad record"; sentencing court may not rely on erroneous "factual assumption"); *Weston*, 448 F.2d at 633-34 (defendant's prior dealings in

narcotics); *Malcolm*, 432 F.2d at 816 (defendant's prior criminal record; sentencing court may not rely on "material false assumptions as to any facts").

Appellant's consecutive sentences rested on materially false assumptions as to the nature and number of convictions, the criminality of the conduct, and other crucial factors in the sentencing decision. Therefore, to the extent that only some of the convictions were deemed subject to challenge, reasonable jurists could disagree on whether resentencing was required because the district court's reliance on the materially inaccurate belief that appellant had committed substantive offenses adversely affected the sentence. Importantly, the standard of COA consideration applicable to denial of an evidentiary hearing and similar errors affecting the content of the record does not require an inquiry into whether the movant has presented enough evidence or affidavits to prevail. *See United States v. MacDonald*, 641 F.3d 596, 612-14 (4th Cir. 2011) (granting COA as to procedural issue, where district court denied habeas claim; district court should not have prohibited expansion of record to include evidence received after trial and after filing of motion); *Harrison v. Quarterman*, 496 F.3d 419, 427 (5th Cir. 2007) (defendant is not required to prove by a preponderance of the evidence that the result of the proceedings would have been different). *See also Long v. United States*, 626 F.3d 1167, 1169–70 (11th Cir. 2010) ("district court must develop a record sufficient to facilitate appellate review of all issues pertinent to an application for a certificate of appealability").

On all four questions presented, this case meets the standard for granting a certificate of appealability.

See Buck v. Davis, 137 S.Ct. 759, 774 (2017) (explaining that the COA gatekeeping function requires a petitioner to do no more than "make a preliminary showing that his claim was debatable"). A court should not resolve the application for a COA on the basis of predicting the ultimate outcome of an appeal, but on the potential for differing views among reasonable jurists. *See Miller-El v. Cockrell*, 537 U.S. at 337. "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Thus, courts must resolve doubts about whether to grant a COA in favor of the movant, and may consider the severity of the penalty in making the decision. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997).

The merits and procedural rulings by the district court—including denial of an evidentiary hearing and failure to consider the trial and sentencing record—are matters about which a reasonable jurist could conclude that further review is warranted.

WHEREFORE, Appellant Manuel Lopez-Castro requests that the Court grant a certificate of appealability.

Respectfully submitted,

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Dated: Jan. 28, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13218-A

MANUEL LOPEZ-CASTRO,

Petitioner/appellant,

versus

UNITED STATES OF AMERICA,

Respondent/Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Aug. 8, 2019)

BEFORE: WILLIAM PRYOR and GRANT, Circuit Judges.

BY THE COURT:

Manuel Lopez-Castro has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated May 23, 2019, denying his motion for a certificate of appealability in the appeal of the dismissal, or, alternatively, denial of his 28 U.S.C. § 2255 motion to vacate. Because Lopez-Castro has not alleged any points of law or fact

that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is

DENIED.