App. No. _____

In The

Supreme Court of the United States

Manuel Lopez-Castro,

Petitioner,

v.

United States of America,

Respondent.

PETITIONER'S APPLICATION TO EXTEND TIME
TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Petitioner Manuel Lopez-Castro respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for sixty days to January 5, 2020. The court of appeals issued its order denying a certificate of appealability under 28 U.S.C. § 2253 on May 23, 2019. App. A, *infra*. Petitioner timely filed a motion for reconsideration on June 13, 2019. App. B, *infra*. The court denied Petitioner's motion for reconsideration on August 8, 2019. App. C, *infra*. Absent an extension of time, the petition would be due on November 6, 2019. Petitioner is filing this Application at least ten (10) days before that date. *See* S.Ct. R. 13-5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Background

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit based on substantial questions relating to the retroactive application of decisions of this Court that invalidate federal criminal convictions by restricting the application of federal criminal statutes. Petitioner presented claims that showed his actual innocence of fraud and related convictions based on supervening decisions of this Court interpreting the scope of 18 U.S.C. §§ 1341 and 1343. The court of appeals denied a certificate of appealability from the denial of petitioner's 28 U.S.C. § 2255 motion in the district court, relying on the theory that a defendant whose actual innocence rests solely on a supervening decision of this Court cannot overcome the § 2255 one-year statute of limitations. The decision below deepens a circuit conflict regarding the scope and application of the actual innocence doctrine in the absence of newly-discovered fact evidence. The issues are of fundamental importance to preventing the continued incarceration of persons who are actually innocent and thus may warrant granting a writ of certiorari. Preparation of the petition will require substantial legal research and review by counsel including as to circuit conflicts. The issues are complex. The important issues and collateral impact of the decision support granting this extension of time.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for sixty days for the following reasons:

1. Due to case-related and other reasons additional time is necessary and

warranted for counsel to research the decisional conflicts, and prepare a clear, concise, and comprehensive petition for certiorari for the Court's review.

2. The press of other matters makes the submission of the petition difficult absent the requested extension. Petitioner's counsel faces numerous direct-appeal briefing deadlines in criminal cases over the next 45 days, including briefs or petitions due in 11th Cir. Nos. 16-16505, 18-10755, 18-11458, 18-12838, 18-14951, 19-10740, 19-12272, 19-13238, and 19-13297. Counsel also faces multiple trial court evidentiary hearings in the next three weeks for oral argument in *United States v. Amor*, 11th Cir. No. 16-11049, on November 19, 2019.

3. The forthcoming petition is likely to be granted in light of, among other things, the need to address the important circuit conflict regarding the scope and application of the actual innocence and manifest injustice exceptions to post-conviction timing bars.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended sixty days to and including January 5, 2020.

Respectfully submitted,

/s/ Richard C. Klugh

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October 2019

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13218-A

MANUEL LOPEZ-CASTRO,

Petitioner-Appellant,

versus

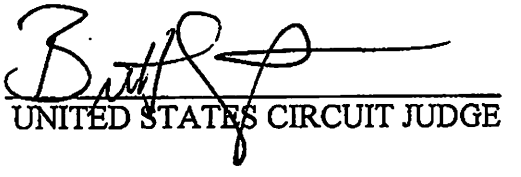
UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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.



UNITED STATES CIRCUIT 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 RECONSIDERATION OF ORDER DENYING CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Manuel Lopez-Castro v. United States
Case No. 18-13218-A

Appellant Manuel Lopez-Castro files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Bergendahl, John E.

Dimitrouleas, Hon. William P.

Fajardo Orshan, Ariana

Greenberg, Benjamin G.

Klugh, Richard C.

Marcus, Hon. Stanley (as United States Attorney, Southern District of Florida)

Smachetti, Emily M.

Tamen, Frank

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APPENDIX B

MOTION FOR RECONSIDERATION OF ORDER DENYING CERTIFICATE OF APPEALABILITY

Appellant, Manuel Lopez-Castro, through undersigned counsel, respectfully moves for reconsideration of this Court's Order of May 23, 2019 (Appendix A, attached), denying Appellant's motion for a certificate of appealability (Appendix B, attached). Appellant moved for a COA as to 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.**

INTRODUCTION

This Court should reconsider its initial decision for the reasons stated in this motion and the COA motion. The issues presented by this case are of fundamental importance to the application of the actual innocence doctrine and to distinguishing the related doctrines of statutory and equitable tolling of federal habeas petitions. Failing to address on the merits the fundamental issues raised in this case will both create a circuit conflict and diverge from the Supreme Court's admonition in *Buck v. Davis*, 137 S.Ct. 759, 774 (2017), that the COA gatekeeping function requires a petitioner to do no more than "make a preliminary showing that his claim was debatable," and that merits determination of an issue—such as the first impression issue in this case—cannot be made as the basis for denial of a COA.

First, the district court's failure to even acknowledge that the defendant was wrongly convicted of federal fraud offenses should be addressed by this Court. *See United States v. Corona*, 885 F.2d 766 (11th Cir. 1989) (holding that under *McNally*

v. United States,483 U.S. 350 (1987) the fraud conduct alleged in the indictment in appellant's case was ***not*** criminal). There is no reported case in which this Court has approved denial of post-conviction relief on a first 28 U.S.C. § 2255 motion where the defendant was convicted of an offense that does not violate federal law.

Other reasonable jurists who disagree with the district court include:

- Supreme Court: *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 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);
- Third Circuit: *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");
- Fifth Circuit: *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.");

- Sixth Circuit: *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***.") (emphasis added); *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. As discussed *infra*, numerous 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.") (emphasis added);

- Eighth Circuit: *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***") (emphasis added);
- Ninth Circuit: *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 United States v. Peter, 310 F.3d 709, 715 (11th Cir. 2002) ("Peter's innocence of the charged offense appears from the very allegations made in the superseding information" rather than from newly discovered evidence; vacating conviction as void, despite procedural default, because supervening Supreme Court showed "proof of the alleged conduct, no matter how overwhelming, would have brought it no closer to showing the crime charged than would have no proof at all"); *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1086 (11th Cir. 2017) (*en banc*) ("McCarthan also could have 'tested' the legality of his detention in ***his first motion to vacate***. That is, he could have made the argument that his prior convictions did not qualify him for an enhanced sentence under the statute.") (emphasis added); *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).

Counsel has been unable to locate, and neither the government nor the district court cited, any reported decision finding *McQuiggin* inapplicable to a *Bousley* innocence claim—i.e., that where supervening, retroactively-applicable precedent bars

conviction for the charged conduct procedural default is excused—or that *McQuiggin* in any way limited *Bousley* ***as to a first § 2255 motion***. Thus, even if there were any post-*McQuiggin* decisions purporting to limit the actual innocence doctrine in the context of the constitution's savings clause or the statutory successive petition bar, for which different considerations are at stake, and no such cases have been found covering the circumstances of this case, they would not support the denial of § 2255 relief in this case or the denial of a COA.

By discounting the essential fact that the appellant did not commit a wire fraud or Travel Act violation, and that those statutes are, based on intervening governing authority, inapplicable to the wrongly-charged offenses in this case, the district court's ruling is one about which reasonable jurists could disagree, with reasonable jurists concluding that maintaining an invalid conviction violates due process and can be remedied in a first § 2255 motion.

ARGUMENTS CAPABLE OF REASONABLE DEBATE

The 1984 prosecution of appellant for RICO violations (18 U.S.C. § 1962) that turned on whether he committed Travel Act (18 U.S.C. § 1952) and wire fraud (18 U.S.C. § 1343) offenses is rendered invalid by intervening authority. *United States v. Corona*, 885 F.2d 766, 768, 773 (11th Cir. 1989) ("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 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**.**").

Appellant's actual innocence of the offenses of conviction, as established by retroactively-applicable controlling precedent, *see Corona*, 885 F.2d 766, permitted him to file his motion beyond the AEDPA one-year time limitation and excused any procedural default. *See McQuiggin v. Perkins*, 569 U.S. 383, 392, 133 S.Ct. 1924, 1931 (2013). Appellant's actual innocence argument rests on binding, retroactively-applicable substantive statutory interpretation decisions rendered after appellant's conviction became final. The charge of acting as real estate attorney representing a drug dealer who bought Florida real estate failed the statutory requirements of the Travel Act prohibition against distributing illegal proceeds to a criminal participant. Nor did appellant, in 1984, commit wire fraud by depriving the IRS of any information needed to perform its record collection responsibility.

The invalid theories for conviction were relied on by the trial and sentencing

judge, were erroneously explained in the jury instructions, and formed the basis for all of appellant's convictions, including predicates for the RICO charges.

Appellant'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 and reliance on inapplicable parole release statutes. 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").

Also, the jury instructions omitted and misstated essential elements, causing the jury to convict on the erroneous theory that performing real estate attorney work to facilitate the purchase of property violated the Travel Act and that failing to provide accurate records to the IRS constitutes wire fraud.

In response to the § 2255 motion, the government argued procedural default and untimeliness—not the merits. DE5:4, 6. The government failed to offer any factual basis to sustain the convictions or contest that the allegations of 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 and argued that since no new evidence exists, the actual innocence standard cannot be satisfied. DE5:4 (arguing that appellant "cannot possibly" show actual innocence without newly discovered evidence).

In reply to the government's response, appellant explained 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. DE6:2 (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* DE6-1 to 6-3 (attaching criminal docket, indictment, and jury instructions).

The district court erroneously: concluded that factual innocence and the actual innocence doctrine are inapplicable to retroactively-effective precedent proving a conviction for conduct not criminal (DE7:4); *created* a novel due diligence requirement to bar consideration of actual innocence (DE7:4); ignored the impact of the *Corona* decision on appellant's Travel Act convictions and simply assumed that the record showed that "[h]ere, there was more than just a normal purchase and sale" of real estate and that normality of the sale—rather than distribution of proceeds to a

criminal participant—was dispositive (DE7:4); continued the trial court's error of believing that Eleventh Circuit Pattern Offense Instruction 71 on the Travel Act applied (DE7:4), when that instruction applied to a Travel Act offense of which appellant was never accused; and discounted the effect of the materially false information at the original sentencing, by suggesting its effect on the original sentencing judge was irrelevant (DE7:5). The district court did not acknowledge the fundamental *McNally* error in the wire fraud instructions. *See* DE7:4.

SUMMARY DENIAL OF RELIEF AND FAILURE TO REVIEW RECORD

Reasonable jurists could debate whether appellant was entitled to an evidentiary hearing, a review of the trial and sentencing record, and ultimately relief on his § 2255 motion. The facially meritorious claims of actual innocence and due process violations 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 made criminal. The district court's misapplication of the law governing actual innocence taints the denial of relief. The district court misconstrued the Travel Act jury instructions and offense elements and wrongly gauged sentencing prejudice not on the sentencing that occurred, but on the resentencing that might occur in the future, because of the judge's *unexplained* low regard for appellant before considering the record, including prior sentencing

proceedings, in this criminal case. *See 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").

The district court's erroneous construction of the actual innocence doctrine to require a showing of due diligence or equitable tolling contradicts *McQuiggin v. Perkins*, 569 U.S. 383 (2013). *See id*. at 392 (timing of presentation of actual innocence claim cannot bar its consideration; actual innocence gateway flows from "fundamental miscarriage of justice exception" to procedural default bars and statutes of limitations). Thus, reasonable jurists could debate whether appellant was required to justify not filing his § 2255 at an earlier time; similarly, the government's assertion that the timing was relevant because there was no complete record is simply false. The complete record exists and confirms the allegations of the § 2255 motion; district court reliance on equitable tolling or due diligence issues was legally erroneous and factually unfounded. The record exists and the manifest injustice of maintaining a conviction and sentence where subsequent controlling authority shows the invalidity of the convictions has no time limit for a first § 2255 motion.

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. 333, 346–47 (1974); *Mays v. United States*, 817 F.3d 728, 736 (11th Cir. 2016)

(collateral review available for conviction of nonexistent offense).

1. *This Court, on reconsideration, should conclude that reasonable jurists could dispute whether due process compels relief or further proceedings in a first 28 U.S.C. § 2255 motion filed by a defendant who is actually innocent of the offenses for which he or she is imprisoned.*

In *Bousley v. United States*, 523 U.S. 614, 620 (1998) 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." *Accord Welch v. United States*, 136 S.Ct. 1257, 1267 (2016).

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. 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*, 136 S.Ct. at 1267

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.[1] It does not exclude the situation where a defendant is factually innocent because his conduct, no matter the proof by the government, does not violate the law.

In *Davis*, 417 U.S. at 346–47, 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." *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 innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for

[1] *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 procedural default"); *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) ("miscarriage of justice exception" applies to actual innocence).

Appellant was indicted on the basis of 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 was that by traveling to facilitate a drug trafficker's purchase of 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 prosecution distorted the two statutes because there was no honest services wire fraud offense and only distribution of proceeds to criminal participants mattered under the Travel Act. 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 *Corona*—establishes that the conduct did not violate federal law.

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 lawful purchase and sale of goods at market prices. *Corona*, 885 F.2d at 773; *see also United States v. Lightfoot*, 506 F.2d 238, 241 (D.C. Cir. 1974) (Travel Act term "'distribute' carries a connotation of distribution of illegal

proceeds *to persons in organized crime conspiracies* [and] for reasons other than normal and otherwise lawful purchase and sale of goods at market Prices.") (emphasis added); *see*, *e.g.*, *Abuelhawa v. United States*, 129 S.Ct. 2102 (2009) (rejecting expansive government's interpretation of facilitation of offense).

As to wire fraud, the indictment charged that the defendants impeded government agencies' collection of data and reports of specified currency transactions and transportation of currency. Contrary to the indictment and the jury instructions, mere failure to provide information to U.S. Customs or the IRS does not constitute "obtaining money or property" under the wire fraud statute, 18 U.S.C. § 1343. *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).

In *Pasquantino v. United States*, 544 U.S. 349, 355–57 (2005), the Supreme Court distinguished a true tax evasion fraud from merely concealing information, holding 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.

The indictment in the present case alleges "a scheme to defraud" but made no claim 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.

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. "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).

"[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 to have deprived nor intended to deprive the government or government agency of money or property. *See United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014).

2. *Where supervening precedent, retroactively applicable under Teague v. Lane, 489 U.S. 288 (1989), establishes a*

> *conviction for conduct that does not constitute a crime, the defendant has met the requirement under McQuiggin v. Perkins, 569 U.S. 383 (2013), for a first § 2255 motion notwithstanding the one-year statute of limitations, where his wire fraud convictions (for obstructing IRS record-collection functions), Travel Act convictions (for serving as an attorney in a drug offender's real estate transaction), and RICO convictions (for the alleged fraud and travel conduct) are invalid and 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, even though the court mistakenly asserted that it did not have access to the complete trial record, and instead relied solely on the indictment, criminal docket sheet, and transcript of jury instructions. *See* DE:7:1. Despite failing to review any of the evidentiary record in the case, the district court asserted that appellant might not have been "merely acting as a lawyer and receiving a fee for that [and] more than just a normal purchase and sale." DE:7:4. But that was not the government's theory at trial, nor would that theory have been enough under *Corona* to satisfy the distribution-to-criminal-participants requirement of the Travel Act provision at issue.

There was no allegation that appellant had distributed criminal proceeds to himself, as implied by the court's reference to receipt of a fee. Consequently, when

the district court refers to "more than just a normal purchase and sale," DE7:4, 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.

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. 28 U.S.C. § 2255(b). 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). Because the relevant facts have been *reliably* found at a full and fair hearing much less 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); *Townsend v. Sain*, 372 U.S. 293, 312 (1963). 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.

3. *The jury instructions misstated essential elements of the wire fraud and Travel Act chargess, resulting in appellant's conviction for lawful conduct.*

The Travel Act verdict was premised on defective jury instructions permitting conviction for conveying funds for real estate purchases made by a drug trafficker.

The § 2255 court's failure to address the *McNally*-violative wire fraud instructions and misinterpretation of the Travel Act instructions present issues about which reasonable jurists could disagree.

With regard to the void wire fraud theory on which the jury was instructed, the trial judge in the criminal case recognized the error and subsequently dismissed the fraud charges against appellant's co-defendants. *See Corona*, 885 F.2d at 767. Permitting the case to go to the jury on a theory of non-property fraud was a fundamental error. *See United States v. Shotts*, 145 F.3d 1289, 1295–96 (11th Cir. 1998); *United States v. Conover*, 845 F.2d 266, 271 (11th Cir. 1988).

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. *Corona*, 885 F.2d at 773 (absent s criminal participant who received any funds *distributed* in relation to, or as a result of, charged travel, there is no Travel Act offense).

The district court erroneously concluded that the Travel Act instructions did not run afoul of the *Corona* decision, because they were consistent with a pattern jury instruction. 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 "promot[ion]" offense not at issue. *See* 11th Cir. Pattern Inst., Offense Inst. 71 (government must prove "Defendant traveled with the specific intent to promote, manage, establish or carry on an unlawful activity"). Reasonable jurists could dispute the court's denial of the jury instruction claim.

4. *The district court misapplied the requisite prejudice analysis for the due process violation at sentencing and erroneously denied an evidentiary hearing where appellant's sentence was premised on invalid convictions.*

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, foreclosure of the issue by asserting that its familiarity with new, post-sentencing events could dispose the court to impose a harsh sentence was inapposite to the prejudice inquiry—and was at least premature in the absence of an evidentiary hearing. 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 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) (defendant's prior criminal record); *Townsend v. Burke*, 334 U.S. 736 (1948) (defendant's prior criminal record); *United States v. Tobias*, 662 F.2d 381 (5th Cir. 1981) (defendant's intent to manufacture PCP; sentencing court may not rely on "incorrect assumptions from the evidence"); *United*

States v. Espinoza, 481 F.2d 553 (5th Cir. 1973) (defendant's "bad record"; sentencing court may not rely on erroneous "factual assumption").

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. Reasonable jurists could debate whether a later § 2255 judge's about whether he would impose a lower sentence today is the test for sentencing prejudice, as opposed to the governing test of whether there is a reasonable probability that the constitutional error affected the actual sentencing judge in the case. *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).

WHEREFORE, Appellant Manuel Lopez-Castro requests that the Court grant his motion for reconsideration.

APPENDIX B

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this motion complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this motion contain 5,052 words.

s/ Richard C. Klugh
Richard C. Klugh, Esq.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was electronically filed and thereby served on counsel for the appellee this 13th day of June, 2019.

s/ Richard C. Klugh
Richard C. Klugh

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

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.

APPENDIX C